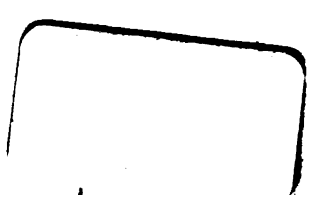

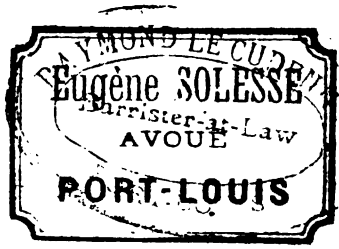

L. J. Lincoln.
1928

DECISIONS

OF THE

SUPREME COURT. OF MAURITIUS.

DECISIONS

OF THE

SUPREME COURT OF MAURITIUS

1907

EDITED BY

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AND

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MAURITIUS

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1907.

TABLE OF CASES REPORTED

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OF THE

SUPREME COURT OF MAURITIUS

PROCUREUR GENERAL *v.* STIPENDIARY MAGISTRATE OF FLACQ AND DAWOOCHAND.

1907
Feb. 11.

Labour Law—Habitual Idleness— Ordinance 12 of 1878 (art. 116)— Discharge of Laborer—Trial after discharge.

A complaint charging habitual idleness, lodged before termination of the labourer's contract, was heard after the contract had expired and was dismissed

Held, reversing the Magistrate's decision, that the prosecution was not barred by the completion of the labourer's contract of service.

APPEAL by way of CERTIORARI against a judgment of the Stipendiary Magistrate of Flacq, dismissing a charge of habitual idleness against one Dawoochand. On the 22nd June 1906 complaint was lodged under art. 116 of the Labour Law. Contract of service expired on the 13th July and in accordance with art. 103 of the Law, the usual certificate of discharge was forwarded to the Magistrate and received on the 15th of July. Dawoochand appeared on summons on the 16th July and the Magistrate struck out the case on the ground the the relation of master and servant no longer existed. He laid stress apparently on the wording of the certificate of discharge : "... has this day *completed* the engagement." As the contract of service had terminated, he thought all complaints connected with its execution were no longer entertainable.

Across the certificate a note was written to the effect that there was a case pending against the discharged labourer.

Feb. 11. Serret Ag. S. P. G : Court would have no difficulty in deciding that the Magistrate was wrong. The law compelled the estate to send in the certificate of discharge : this cannot

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have had the effect of barring prosecution for an offence alleged to have been committed during the existence of the contract.

Both respondents left default.

Judgment of the Court (Sir V. Delafaye C.J. and Kœnig J.) was delivered on *Feb. 11* by

SIR V. DELAFAYE C.J.—We quite agree with the Substitute and think the Magistrate was clearly wrong. The case will be remitted to him to be proceeded with on the merits.

Bérenger Ag. C. A.

Record No. 29801.

Feb., 11.

PROCUREUR GENERAL *v.* STIPENDIARY MAGISTRATE OF FLACQ AND RAMSAHAYE.

Labour Law—Lawful order—"Labourer"—"Groom"—Employment by Manager—Ordinance 12 of 1878.

A person engaged in India to work as a labourer in Mauritius, is liable under Ordinance 12 of 1878 to be employed as a groom on the estate or on the premises of his employer.

APPEAL by way of CERTIORARI against a decision of the Stipendiary Magistrate of Flacq, acquitting one Ramsahaye of a charge of refusal to obey a lawful order.

One Ramsahaye was engaged in India to work as a labourer in Mauritius (generally) and was allotted to "Constance Manès" Estate—Flacq. He there worked for some time as a groom. He was then ordered to work as a groom at Mérandon's place at Curepipe. Mérandon was one of the owners and the manager of the Estate. The order was disobeyed and the labourer prosecuted under art. 110 of Ordinance 12 of 1878. After evidence heard the Magistrate dismissed the charge being of opinion that "défendant having been employed as a labourer only, was not liable to be engaged as a groom on the manager's premises.

The case as argued rested mainly on the meaning of the word labourer and the question whether a person engaged as labourer may not be ordered in terms of his contract to work as a groom.

Feb. 11. Serret Ag. S.P.G. The Ordinance does not define

" laborer " but servant is defined and includes " labourer ". Quotes dictionary meanings, Century, Encyclopædic, Fleming. Stroude. Labourer has a much wider sense than the French " laboureur ", and the Magistrate was wrong to restrict its meaning to " worker of the soil. " Again in art. 111 of the Labour Ordinance we read that no servant engaged for field labor shall be compelled to work on a Sunday save as shall be of immediate necessity for care and feeding of animals, cleanliness of yards, sties, stables &c. &c. 1907

Both Respondents left default.

The Court (Sir V. Delafaye C.J. and Kœnig J.) delivered judgment :—

SIR V. DELAFAYE C.J.— We think the Magistrate took a mistaken view of the meaning of the word labourer and that the order was lawful. Case remitted to be dealt with in the light of this decision.

Bérenger Ag. C. A.

Record No. 29802.

PROCUREUR GENERAL *v.* STIPENDIARY MAGISTRATE OF FLACQ AND RAMADOO.

March, 26.

Labour Law—Desertion — Art. 119 of Ord. 12 of 1878— Practice— Striking out Case—Absence of Informant—Rule 47 of Rules of Practice of 1879.

It is essential that formal notice be given to an informant of the day fixed for the hearing of the case against a deserter who has been brought before the Magistrate, after his arrest.

APPEAL by way of CERTIORARI against an order of the Stipendiary Magistrate, striking out a case of desertion.

On the information of Chardoillet accountant of " Queen Victoria and Bonne Mère " Sugar Estate, exhibited before the Magistrate, warrant for the arrest of one Ramadoo a deserter was issued on 26th November 1906 and entrusted to the police for execution. The warrant was executed on the 31st January 1907. It was endorsed as follows "Warrant executed by corporal " " Dick by the arrest of the Indian Ramadoo No. 420158 thro : " " the guardian Narainen on the 31.1.07 at 5 p.m. in the Camp- " " Flacq P. S. 1.2.07 (s) C. DICK."

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On the 1st of February the prisoner was brought before the Magistrate: the case was called and struck out, the informant leaving default.

Serret Ag. S.P.G. The Estate Authorities complied with the Law. They ought to have been given notice by the Magistrate, after the arrest of the prisoner, of the day fixed for the hearing of the case. Art. 47 of Stipendiary Rules of Court is clear and leaves no room for distinctions. There is no proof that the estate authorities were actually warned of the arrest. The Magistrate was apparently influenced, as we are informally made aware of, by the fact that "the deserter having been arrested by a guardian of the estate, there was obviously no necessity to warn the estate, and further, that the estate sent word by a police constable that it desired a postponement." Even if those facts are accepted they cannot supplement the notice which should be sent to the informant or complainant.

Both Respondents left default.

The Court (SIR V. DELAFAYE C.J. and KŒNIG J.) quashed the order of the Magistrate and remitted the case back to him to be dealt with according to Law.

Bérenger Ag. C. A.

Record No. 29856.

March. 25.

JEAN LOUIS & ANOR *v.* JENKINS

Appeal from Decision of District Magistrate—Practice—Notice of the Appeal—When to be served on the Respondent

The notice to be given to the Respondent of an Appeal, is not a notice of the lodging of the Appeal in the Supreme Court, and may therefore be served before the Appeal is lodged in the Registry of the Supreme Court.

Gokoul v. Houghton (*a*) followed.

Moojondi v. Hossein (*b*) discussed.

Preliminary OBJECTION on the hearing of an APPEAL against a Decision of Mr Magistrate Noël of the 1st Division—Port Louis.

Sir W. Newton K.C. and *Gellé* were for the Appellants.

Laurent for the Respondent.

The point discussed appears sufficiently from the judgment

(*a*, *b*) *See next page.*

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of the Court (Sir V. Delafaye C.J. and Kœnig J.) which was delivered on *March, 25* by

KŒNIG, J.— This is an Appeal from a decision of the District Magistrate of Port Louis, 1st Division. An objection is raised, *in limine*, to the competency of the appeal, on the ground that the notice to the Respondent has been served previous to the lodging of the appeal in the Registry. It is contended, on behalf of the Respondent, that so long as the latter formality has not been fulfilled, there is no appeal but only an intended appeal, and that the law requires that notice of the appeal, and not of an intended appeal, should be served on the Respondent.

This point has been raised and overruled in the case of *Gokoul v. Houghton (a)*. But a reference is made in the judgment to an unreported case of *Moojondi v. Hossein (b)* in which Mr. Justice Leclézio appears to have been of a contrary opinion. It is true that in this case, two objections were raised, and that the record does not show on which objection the appeal was dismissed, but as the other objection was that the amount of the security funished was insufficient, the presumption is that the learned Judge would not have dismissed the appeal on that ground, but would have remitted the case to the Magistrate for amending of the recognizance. The presumption is strengthened by the fact that in a judgment delivered shortly afterwards *Michaud v. Serret (c)*, Chief Justice Ellis states that the question of the inadequacy of the recognizance "though apparently mooted before, now arises for decision for the first time".

The law in force at the time was art. 61 of Ord. 43 of 1852 which ran as follows: "Every person so appealing shall, within 5 days from the date of the judgment, exclusively, give notice in writing of such intended appeal to the District Magistrate...The party having been so bound by recognizance shall lodge his appeal in the Registry of the Court and give to the Respondent notice of the appeal within 5 days from the date of the recognizance." This article has been reproduced, with some modifications which have no bearing on the point under consideration, by

(a) S. C. R. 1880, p. 87 (b) 1879, Record No. 714 Box 257.
(c) S. C. R. 1880, p. 140.

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art. 47 of Ord. 22 of 1888. It should, however, be mentioned that in the old text the party appealing was to give to the Magistrate notice of such *intended appeal,* and that the word *intended* has been omitted from the new text.

Apart from this omission, to which we do not attach any undue importance, we find no warrant for the proposition that so long as the appeal has not been lodged in the Registry there is no appeal at all; and we agree with the learned Judge who sat in the case of *Gokoul v. Houghton* that it would be stretching the law to say that because the lodging of the appeal in the Registry is mentioned before the service of the notice on the respondent, the former formality should, under pain of nullity, be complied with before the latter. In cases of appeal from Rodrigues the lodging of the appeal in the Registry is the last formality in order of time *(d)* and the same might be said of former appeals from Seychelles *(e)*.

Nullities of procedure should not be presumed, especially when the result of the nullity would be to deprive the party against whom it is invoked of any further remedy. If the legislator had willed to make it imperative, on pain of nullity, that the lodging of the appeal in the Registry should precede the service of the notice on the Respondent the law would have said so; it merely directs that notice of the appeal shall be given to the respondent and we are not prepared to hold that this means: notice of the lodging of the appeal in the Registry.

We are therefore of opinion that the objection should not be sustained and we accordingly overrule it. Costs reserved.

Objection overruled.

Attorney for Appellants *de Chalain.*

Attorney for Respondent *Chaillet.*

Record No. 1164.

(d) Art. 5 of 31 of 1882. *(e)* Arts. 14-15 of 22 of 1853.

DE SYLVA *v.* APPASAMY

1907

April, 3.

Labour Law—Appreciation of fact—Decision of Magistrate reversed.

Circumstances under which a decision of a Stipendiary Magistrate was reversed on the facts.

Appeal from a judgment of the Stipendiary Magistrate of Flacq by which he fined Appellant Rs. 20 and awarded against him Rs. 10 as damages on a charge of ill-usage and assault brought by a labourer of " Belle Vue " estate on which accused is an overseer, and from the further decision of the Magistrate cancelling the contract of service of the labourer with the estate on account of such ill-treatment.

Leclézio was for Appellant.

Serret Ag. S.P.G. supported the Magistrate's finding.

The facts argued upon appear sufficiently from the judgment of the Court (Brown and Kœnig, JJ.) which was delivered on *April 3rd* by

Brown, J.—The question before the Magistrate was purely one of appreciation of evidence of facts, which appreciation depended chiefly upon the credibility of the witnesses heard. The Court has over and over again laid down that in such cases it will not interfere with the finding of the Magistrate who heard the witnesses, unless in very exceptional circumstances. The circumstances here are, it is submitted, exceptional, and are such that the finding of the Magistrate amounts almost to a miscarriage of justice.

The circumstances are the following: On the 11th December, Complainant says he was ordered by overseer de Robillard to work at the mill; he objected to this, stating he could not do that work, and asked to be given other work. He had previously been employed in the smithy, and the reason of his transfer to the mill was that on the day previous he had quarrelled with the mechanic under whose orders he worked in the former place; from words he and the mechanic came to blows, the result being according to complainant that in trying to strike him the mechanic hurt himself by striking a post. De Robillard, according to complainant declined to accede to his request to give him other work, cursed him and ordered him to go home, saying he

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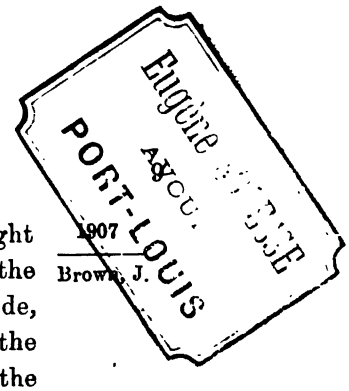
Brown, J.

would prosecute him. Complainant answered that before being prosecuted he would see Mr Le Noir, as he (Le Noir) was the Manager of the estate. He says he saw Le Noir, who told him to come to him in the afternoon when he would see Mr de Sylva with him and mention the matter.

At about 4 p.m. he saw Le Noir, de Sylva and de Robillard and another gentleman together. He approached them raising his hat, when de Sylva went up to him and asked " did I not promise to give you work ? ", this question was repeated twice, and twice witness answered in the affirmative— de Sylva then swore at him, gave him a slap on the back of the head, and then thrashed him with a stick, he turned and fled, receiving as he did so a blow on the shoulder which took a little skin off. He was assaulted near the cane-carrier. He went to the police and lodged a complaint; he was asked, he admits, whether he had any witnesses, and he admits he said he had none. He was examined by Dr Monty (the Government Medical Officer) who has deponed to the existence of certain marks of violence chiefly on the back part of the body; he said nothing however of any abrasion of the skin on the shoulder. Though he had stated to the Police that he had no witnesses, Complainant called a man of the name of Ozeer, who does not belong to the estate, to corroborate his evidence as to the assault. Ozeer was summoned only on the morning of the day of which the case was heard. He says he had never spoken to complainant until he was summoned. He did not know him even by name, he says. On the afternoon of the 10th he was purchasing vegetables by the road side opposite the Camp when he saw de Sylva strike Complainant several blows with a stick. This was the extent of his evidence in chief. In cross examination, he was asked to describe the position of the parties when the assault took place and his own position. He was, he says, 200 feet from them, the assault was committed not near the mill, but near the smithy. He could see the smithy from where he stood, but admits a hedge lies between the road and the mill, preventing any one on the opposite side of the hedge from seeing what was going on at or near the mill.

Dr Monty examined complainant on the 11th, at what hour



Brown J.

was not elicited. He found a contusion at the back of the right elbow, the marks of a blow on the left side of the back, and the mark of a blow on the middle of the back on the right side, three inches in length, also a contusion on the outer side of the middle of the left thigh. The Doctor was not asked whether the traces were those of recent violence and whether appearances were consistent with the theory that the violence was inflicted the day before. For all the evidence shows, the examination may have taken place before the assault complained of. Overseer de Robillard called by the defence states in effect that on the afternoon of the 10th his attention was called to a row in the smithy. He went to see what was the matter and found the smithy mechanic Normand in the act of banging complainant against a post The mechanic reported to him that complainant had been insolent and had assaulted him and he had thrashed him—this was said in complainant's presence, and complainant admitted he had been beaten. Next morning by order of the Manager in chief, witness sent complainant to work in the mill. Complainant asked to be given light work, showing witness the marks on his body which were now attributed to an assault by de Sylva; witness said that was not his business, and that he must do the work assigned to him. Returning half an hour later, he found complainant had left his work. In the afternoon, he was near the mill, when de Sylva drove up. Complainant went up to the latter and spoke to him, witness saw de Sylva raise his stick and heard him threaten to prosecute complainant. Complainant seized hold of the stick, de Sylva wrenched it from him and told complainant to be off, and complainant went away. The mill is screened from the view of the vegetable seller by a bamboo hedge, and there was also a building between the vegetable seller and the mill yard. The cane carrier is hidden from the view of the vegetable seller by the building. This witness was not cross-examined either by the complainant or by the Court.

Normand declared that on the 10th complainant was working under his orders, they had words. Complainant swore at him, whereupon he thrashed him with a stick and finally knocked him against a post. De Robillard came up and put an end to

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the fight; witness said he was not connected with the estate, he is in the employ of Mr Tostée, an engineer, by whom he was sent to make certain repairs. He denies having hit a post, he swears he thrashed complainant.

George Thomas, a blacksmith on the estate, saw de Sylva threaten complainant with a stick. Complainant seized the stick de Sylva wrenched it from him and complainant ran away.

The defence as it seems was that the bruises found on complainant's body were the result not of an assault by de Sylva but of the thrashing given by Normand, and that Ozeer's evidence should be rejected because it was physically impossible for him to see what occurred near the mill where the alleged assault was stated by complainant to have taken place.

The Magistrate reserved judgment and afterwards found accused guilty of a cowardly and brutal assault, fined him Rs 20, ordered him to pay Rs 10 as compensation and cancelled complainant's contract with the estate on the ground that he had been "cruelly ill used and that after what had occurred his life on the estate would be intolerable."

The only reason assigned for this decision by the Magistrate is that he rejected as wholly unreliable the evidence of Normand who he remarked had been, as a matter of fact, an employé of "Belle Vue" estate. He gives no reason for rejecting the evidence of Overseer de Robillard and Thomas, leaving us to infer that he rejected it on account of their connection with the estate. He says nothing as to the important point arising out of the evidence of Complainant and Ozeer, and that of de Robillard that the alleged assault having taken place according to complainant's showing near the cane-carrier, that is, near the mill, Ozeer could not have witnessed it. As a fact the record shows no attempt either by the complainant or by the Court to cross-examine the witnesses for the defence, whilst the facts elicited in cross-examination of complainant and his witnesses are apparently ignored.

The evidence of Dr Monty as we have pointed out is *per se* inconclusive as to the guilt of de Sylva; he saw the accused on a certain day, and noticed traces of violence, that is all he can say. The crux of the case even from the Magistrate's apparent

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point of view was the evidence of Ozeer. Now it appears to us that the reliability or trustworthiness of this evidence was dependent upon the issue raised as to whether it was physically possible for him to witness the assault from the spot where he says he stood. The scene of the assault must be taken to be that which the complainant mentions, that is, near the cane carrier of the mill, and not near the smithy. If so, then we find ourselves in presence of the material fact, resulting from the record that witness Ozeer says the assault was committed near the smithy, and the very precise evidence of Overseer de Robillard that at the place where the witness says he stood, the mill and the immediate surroundings were absolutely shut out from view, not by a hedge only but also by a building. Witness Ozeer admits that there is a hedge along the side of the road passing before the camp which prevents persons on the other side from seeing the mill—whilst we gather from the evidence that the vegetable seller's stall, or whatever it was he sold from, was by the road side on the opposite side by the mill.

It appears to us in presence of the recorded evidence on this point, that if the Magistrate felt any hesitation in accepting this evidence he should have applied the test of a personal or of a thoroughly independent and reliable inspection of the *locus in quo*, instead of simply ignoring facts so material arising out of the evidence of complainant and of his own witness, as well as from the evidence for the defence.

He was not justified in accepting the smithy as the scene of the alleged assault, in presence of the positive assertion of the complainant that he was assaulted near the cane carrier, and if he took the neighbourhood of the cane carrier as the site, evidence of a physical fact easy of verification pointing to impossibility of vision on the part of the witness stared him in the face.

We think further that the very material fact that witness Ozeer says the parties stood face to face during the assault whilst the medical evidence *primâ facie* points chiefly to an assault from behind, has not been sufficiently taken into consideration. The medical witness should have been questioned as to the possibility of those injuries having been inflicted, parties being in the

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position described by complainant's eye-witness. He should also have been asked whether, when he examined complainant the appearance of the bruises was consistent with the theory that the injuries were inflicted on the day previous, or had been inflicted that same afternoon. There was certainly room for a more exhaustive investigation than that which was made, before rejecting wholesale the important evidence for the defence as unreliable apparently for the sole reason, as far as de Robillard was concerned that he was connected with the estate, without even subjecting the witness's evidence to the test of cross-examination.

We must not be understood to convey, in dealing with this matter as we do, that we hold a Magistrate must necessarily accept the evidence of an Overseer, in preference to that of persons moving in a humbler sphere of life. The position of a Stipendiary Magistrate in dealing with estate disputes, is often extremely difficult. Much depends upon the care and discrimination which he bestows on the enquiry, and if after careful investigation and consideration of all the facts the Magistrate arrives at a conviction based upon the belief or disbelief of witnesses we would hesitate to interfere. Being satisfied in this case that the conviction was arrived at on evidence which we cannot but look upon as insufficient under the circumstances we quash the decision. No costs.

Appeal allowed. Decision quashed.

Attorney for Appellant *Leclézio.*

Attorney for Respondent, *Rolando, C.A.*

Record No. 124.

HUGUES *v.* THE BOARD OF COMMISSIONERS OF CUREPIPE

1907

April, 3.

Easement — " Servitude " —Aggravation of— Arts. 640, 645 C.C.— Increase of natural flow of waters—Prejudice—" Eaux ménagères "—Prescription —" Servitude d'égoût " — Arts. 690, 691 C. C.— Board of Commissioners of Curepipe—Powers & Duties of—Liability for tort—Sanitary Regulations of 1889—"Fluids"—Ordinances 12 of 1889, 26 of 1875, 17 of 1883, 32 of 1894-95.

The Board of Commissioners of the town of Curepipe has not a general right of easement over private lands for purposes of public utility ; It is entrusted with the possession control management and repairs of the drains and gutters of the town and if in the discharge of their statutory duties in connexion therewith, they commit tortious acts, they are liable in damages.

Private owners in Curepipe are bound to send and the Board of Commissioners to receive into the street drains and gutters "*fluids*" (including refuse and sloppy waters—"eaux ménagères") coming from their premises. But the Board has not the corresponding right of passing such waters on to other properties.

Art. 640 of the Code Civil is of strict application. The Supreme Court should not follow the French jurisprudence in the temperament that they have brought to the rigorous application of a clear text of law. It is the strict right of the lower proprietor to refuse to receive any excess of waters, which, but for the hand of man, would not have flowed on to his land, whether such waters reach the land by the natural slope or not : Such an excess constitutes the " aggravation de servitude " prohibited by art. 640 and the sufferer is not bound to prove serious prejudice to have it removed.

Held on findings of fact, that the Board of Curepipe had by the maintenance repair or creation of certain works aggravated the servitude existing on the land of a private owner, both by sending more rain water to that land than would have naturally flowed on to it, though not causing very serious prejudice on that head, and by causing sloppy and refuse waters (" eaux ménagères ") to be carried on to that land with the flow of water ; that the filthy mixture of waters had not run over plaintiff's land for more than 20 years, and that even if the right to such an easement could be acquired by prescription the plea of prescription had not been made out in fact.

The Board was therefore ordered to remove the works complained of and to pay Rs 500 damages with costs of suit.

ACTION by A. Hugues Esqre., proprietor in the town of Curepipe, to obtain from the Court a judgment directing the Board of Commissioners of that town to suppress certain works which had for their effect to carry on to his property waters which he was not bound by law to receive, to remove or abate the nuisance caused by such waters, and to pay a sum of Rs. 2.000 for prejudice caused.

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The case submitted for the Plaintiff was the following: Plaintiff is the owner of a property situate in the lower part of Curepipe, composed of two plots of ground, purchased by him at different periods, one in 1883 and the other in 1889. On the first plot, a house has been built in which Plaintiff resides. Owing to the situation of his property Plaintiff received and was bound to receive (art. 640 C.C.) rain water flowing naturally from the lands situate above his — his land being burthened to that extent with a servitude "dérivant de la situation des lieux" —the servitude so restricted cannot be aggravated by the upper proprietors, and if any works are done on, in connection with, or for the benefit of the lands above his having for their effect to aggravate such servitude, invoking art. 640 C. C. he is entitled to ask for the suppression of such works and for damages for any prejudice caused thereby. At the time of his purchase of the first plot of ground, a small quantity of water coming from the upper lands, used to flow on to his land two or three times a year in the rainy season. Since the year 1883, the place where rain water used to flow before reaching his land, has been dug up and converted into a canal or drain, which is in communication with the drain of Curepipe known as the Casino drain. Works have been performed whereby rain water which would not naturally have flowed into the said canal or drain has been artificially carried into it, and whereby the water flowing from the roofs of houses ("égoûts des toits") and the refuse waters and slops ("eaux ménagères") coming from the yards in the neighbourhood have been made to flow into it. In or about the year 1885, a canal in masonry was constructed by the General Board of Health, to drain the yard and premises of Mrs Wilkinson, now the Grand Universal Hotel, into the aforesaid canal or drain, and the water coming thereupon is now thereby made to flow on and through Plaintiff's land. When Malartic street was constructed, numerous drains were made by order of the said General Board of Health, and by the Board of Commissioners of Curepipe, to drain the premises on both sides of the said street into the aforesaid canal or drain. About 1896, the Mauritius Government Railways caused a canal to be constructed from a marsh called "Mare Chasteau-

neuf " (part of the Mare-aux-Joncs) to the aforesaid canal or drain, for the purpose of diverting the water of the said " Mare Chasteauneuf " and by means of the said work, a considerable quantity of water has since that time an outlet into the aforesaid canal or drain and is thus conveyed to Plaintiff's land. Owing to such work, a considerable quantity of water of the description mentioned (i. e. rain waters, waters from the house roofs, refuse waters and slops) which would not naturally have taken such a course, were made by the hand of man to flow into the aforesaid canal or drain and thence through Plaintiff's land, and the easement ("servitude") which existed on the said land has in consequence been unlawfully aggravated.

Since 1889, by operation of law, the defendant Board has possessed, managed and maintained all the drains, canals and gutters which have been constructed by the General Board of Health, and since 1896 has possessed, managed and maintained the canal made by the Mauritius Government Railways. Since the above dates defendant has used and is still using the said drains, canals and gutters for the drainage of the yards, premises and lands, for which they have been used prior to these dates, and has thus continued and maintained a state of things which is unlawful and constitutes a serious infringement of Plaintiff's right and the said Board is liable in damages for the prejudice caused thereby. Defendant is, the proper authority appointed by law to take all necessary measures for the removal and suppression of all drains, canals and gutters of the town of Curepipe, which have been constructed in violation of the law and is bound to cause the drains, canals and gutters afore-mentioned to be removed and suppressed. Morever, since 1889 up to the year 1902, the defendant Board caused certain other works to be performed which have had for their effect to draw waters from various streets and premises into the drain which discharges its waters on the Plaintiff's land, which waters but for those works, would not have reached such land. A complaint by letter having produced no result, Plaintiff caused the defendant Board to be served with a notice to remove and abate the nuisance complained of and this action is the result of non-compliance with such notice.

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The defence was substantially: (*i*) That the course along which water flows and used to flow before reaching the Plaintiff's land and through the said land, is but the bed of a stream which has always existed; (*ii*) denial that any refuse water and slops, ("eaux ménagères") and that any water falling from the roofs ("égoûts des toits") flow into the stream through Plaintiff's land, but admitting such waters do so flow, the defendant Board is entitled to direct such waters into the said stream not only on account of the natural slope of the land, but also by law and for having acquired such right of servitude by prescription of 20 years; (*iii*) All the waters which flow into and along the stream through Plaintff's land so flow only occasionally and have followed what has been their natural course for more than 20 years, and the defendant has in no way altered such course or increased the volume of water which would naturally flow into and along such stream; the prescription claimed is the acquisitive prescription that is the right acquired by 20 years' prescription of using the stream in question for the discharge of such waters as are alleged to flow into it now and further the right of diverting into such stream all such waters (including rain waters which would not have flowed naturally, waters from house roofs, refuse waters and slops) as are alleged to flow into it now. (*iv*) Defendants have made repairs and works which they were entitled in law to make, and the effect of such repairs has not been to increase the volume of water flowing into the stream. On the contrary some of the works made in connection with "Mare Chasteauneuf" have had for their effect to diminish that volume; (*v*) deny any nuisance in or near plaintiff's land: on the contrary have by numerous works done, improved the sanitary condition in Curepipe generally and particularly in the locality where Plaintiff's land is situated; (*vi*) non-responsibility for any acts or works of the General Board of Health or the Mauritius Government Railways; (*vii*) Defendant has been guilty of no negligence, and as a public body, acting under statutory powers, in the discharge of a public duty, is not liable for injuries arising out of the discharge of that duty, and as the natural result of the proper discharge

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of it; (*viii*) if works done previous to the creation of the Board of Commissioners for Curepipe, have caused prejudice to Plaintiff they were done previous to the purchase by Plaintiff on the land in which his house is built, and previous to the construction of such house and the purchase was made and the house was built with the full knowledge of the existence of the works. And as regards to such works as have been executed since the creation of the Board of Curepipe, such works have been executed with the knowledge and without any opposition on the part of Plaintiff.

To Defendant's plea Plaintiff answered in substance: the place where the canal or drain has been dug was not the bed of the stream; Defendant can set up no title, law or any prescription giving the right to divert any water of whatever nature, or at any particular place, and in any manner whatever and to give such water a direction it could not have taken if no work had been done by the hand of man; the easement claimed by Defendant being a discontinous one cannot be claimed by prescription; Plaintiff has always objected to the execution of the works mentioned in his declaration by protest addressed to the General Board of Health, the Colonial Government and Defendant, but even if he had not done so, Plaintiff is entitled within 20 years from the date of the execution of each of the works, to claim the suppression thereof, and to sue for damages.

Sir W. Newton K.C. (*Duclos* with him) for Complainant.

Rouillard for Defendants.

The judgment of the Court (Brown and Davson, JJ.) was delivered on *April 3rd* by

BROWN, J.—Before examining the evidence, it is convenient that we should determine the legal principles by which we should be guided in dealing with the issues of fact raised.

The first point to be settled is whether the Board of Commissioners for Curepipe, the Board of Health or other authorities who before it, had charge of the drainage of the town of Curepipe have any general privilege inherent to their position, by which they are entitled to discharge drainage waters on to private lands without the consent of the owners thereof, in

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other words whether the defendant Board, or any authority whose rights in that respect it may invoke, has over such private lands a general right of easement for purposes of public utility. The answer to this question must be in the negative. Servitudes of this description can only result from a law and no law in force in this colony creates any. If therefore the defendant Board claims any right of easement for the drainage waters of the town over Plaintiff's property it can only claim it under art. 640 of the C. C. as exercising its own right as owner or representing owners of the streets of the town, or of other land therein, i.e. it can exercise only such rights as the owners of lands situate above Plaintiff's land, have, under art. 640 C. C. of discharging their waters on to Plaintiff's land as a consequence of its situation as regards theirs.

The right of easement or servitude resulting from art. 640, is therefore the right with which we are specially concerned in this case. The text of art. 640 runs as follows :

" Les fonds inférieurs sont assujettis envers ceux qui sont plus élevés, à recevoir les eaux qui en découlent naturellement sans que la main de l'homme y ait contribué. Le propriétaire inférieur ne peut point élever de digue qui empêche cet écoulement. Le propriétaire supérieur ne peut rien faire qui aggrave la servitude du fonds inférieur. "

This text is so clear that misinterpretation seems impossible. The respective rights of the upper and the lower proprietors are clearly defined and restricted ; according to the recognized canons of interpretation, when a text is clear it should be applied as it reads, and it is another well recognized principle that laws which have for their effect to limit the right of a proprietor to do what he likes on his property are of strict interpretation. It is admitted by Laurent *(f)*, who has been extensively quoted in this case, that if we apply the text as it stands ("si l'on s'en tient au texte de l'article 640") the question whether the upper proprietor can make agricultural and other works, if the result is an aggravation of the servitude to the prejudice of the lower proprietor could not even be put. The text is clear and categorical. Nothing can be done to aggravate the servitude. The first part of the article is equally clear ; the lower proprietor is bound to receive only such waters as flow naturally from the

(f) Vol. VII p. 436

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upper lands on to his land, without the hand of man having contributed to the same. Bandry Lacantinerie et Chauveau *(g)* confirm the view of Laurent as to the rigidity of the text. In principle, he says, the lower lands are not bound to receive any waters which flow from the upper lands as a consequence of the act of man. On the other hand the proprietors of the upper lands can do nothing to aggravate the servitude burthening the land. The natural servitude is exclusively limited to the necessities resulting from the situation of the respective lands. If, whatever may be his object, the owner of the upper land interferes for the purpose of modifying the natural flow of the waters, the owner of the lower land is entitled to object and to say that nature and the situation of the lands do not compel him to submit to any modification which is the result of the act of man. The position in fact, says the author, after the promulgation of the Code was such that the resistance of the owner of the lower land was, in any hypothesis, invincible; however considerable might be the interest of the upper proprietor and however insignificant the prejudice caused to the owner of the lower property, the latter found in the absolutism of his right of ownership, the means of preventing any innovation. Not only could he claim an indemnity from the proprietor of the upper land, if he received waters outside of the conditions mentioned in art. 640, but he was entitled to have innovations destroyed, and thus to put an end to the aggravation of the servitude.

The French Legislature, recognizing the ridigity of the text, found it necessary to modify it in the interest of the requirements of irrigation and of drainage, by passing laws in 1845 and 1854*(h)*, the object and result of which were to restrict the right of the proprietor of the lower lands to oppose the passage of waters on the ground of aggravation of servitude. Conciliating the interest of public utility and the necessities of agriculture with respect due to ownership, which the framers of the Code had not done in enacting art. 640, those laws tempered the rigour of that article, by providing that in certain cases aggravation should be permitted subject to an indemnity

(*g*) Vol. 5, No. 826. (*h*) Laws of 29th April 1845 & 10th June 1854

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to be fixed contradictorily, and in 1898 *(i)*, there was further legislation with the same tendency. This latter law (art. 1) enacts in principle that every proprietor has the right of using and disposing of the rain waters that fall on his land. If his use of those waters or the direction which he gives to them aggravates the "servitude d'écoulement" created by art. 640, an indemnity is due to the inferior proprietor. Contestations arising out of the application of the servitude thus created, are taken before the Justice of the Peace, who in deciding, says the law, "doit concilier les interêts de l'agriculture et de l'industrie avec le respect dû à la propriété." Art. 4 of the law of th 29th April 1845, had previously, in regard to the matters provided by that law, created a discretionary power in the Courts to conciliate the interest of ownership ("de la propriété") with those of irrigation. The Code, prior to the passing of those laws, had conferred no discretionary power as regards the application of art. 640, this abstention was not a mere omission, for we find that in art. 645, the code expressly provides that in adjudicating upon contestations arising out of art. 644, i. e., between proprietors as to the use of running waters crossing their lands, the Court should conciliate the interests of agriculture with the respect due to ownership ("la propriété"). We see therefore, (*i*) that where the legislature has thonght it desirable that there should be a discretion vested in the Courts, to conciliate general with private rights, it has expressly conferred such discretion, (*ii*) that where it has considered a too rigid application of the principle that there shall be no aggravation of the "servitude d'écoulement" created by art. 640, was undesirable in certain cases, it has expressly permitted such aggravation subject to certain conditions. It follows that art. 640 is of strict application in so far as (*i*) it limits the burthen imposed upon the lower proprietor (*ii*) it expressly forbids the upper proprietor to do any act aggravating the said burthen. As regard "aggravation" the sole question is one of fact; is there aggravation in fact or is there not, that is what the Courts have to determine. If there is aggravation, the lower proprietor is not bound to submit to it

(i) Law of 8th April 1898.

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and therefore is entitled to have it suppressed; if there is none he goes out of Court.

Undoubtedly a hard and fast application of the text of art. 640 seriously interfered with the interest of the owners of upper lands destined for cultivation and therefore with the interest of agriculture. To say that the upper proprietor shall do no works on his land however necessary they may be for the purposes of his plantations, because the result may be a slight aggravation of the " servitude d'écoulement ", is in many cases to doom his lands to perpetual sterility, in others to immobilize cultivation thereon, by making change or ameliorations impossible. We can therefore understand the anxiety of text writers to find some loop hole by which the strict application of the text can be evaded. The principle of art. 640 is borrowed from the Roman law. It would appear that Roman Jurisconsults had a general discretionary power to temper the rigidity of the law in its application by natural equity, and exercising such power in applying the law from which art. 640 is borrowed, they tempered it in the interest of agriculture by permitting works necessitated for the cultivation of the upper lands even though such works had for their effect to aggravate the natural servitude of the upper proprietor, provided serious prejudice was not the result. The principle by which they were apparently guided was that, though technically there might be aggravation, there was in reality none in the absence of serious prejudice. Laurent *(j)* is fain to admit that in administering the Code, the French Courts do not possess the very extensive discretion attributed to Roman Jurisconsults, and that as a rule laws of this kind are of strict application, but he thinks that when a principle is borrowed from the Roman law it should be applied in conformity with the tradition that attached to such principle; Demolombe *(k)* argues that the owner of the lower land when he purchased knew that the natural destination of land is to be cultivated or built upon, he therefore is presumed to have consented in advance to such works as are necessary in order that the upper lands may be used for the purposes for which they are destined, and he is bound to submit to the consequences, provided such works have

(*j*) Vol. VII, No. 370. (*k*) Vol. XII, No. 852.

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not for their effect to send on to his land waters which but for the same would have flowed naturally elsewhere, and always provided serious prejudice is not caused. In favour of this tempering of the strictness of the text in the interest of agriculture, we find such authors as Dalloz (Rep. V. Servitude No. 84), Aubry & Rau (Vol. 3 par. 240), Pardessus (Vol. I Nos. 83 & 85), Duranton (Vol. 5 No. 165), Daviel (Vol. 3 No. 758). In fact there is a general concensus of opinion in that sense.

The Jurisprudence of the French Courts is no less pronounced than doctrine in the same sense. It is succinctly explained in foot notes 3 & 4 to a decision of the Court of Lyons of the 30th November 1899 *(l)*.

" Aux termes de l'art. 640 C.C. le propriétaire supérieur ne peut rien faire " qui aggrave la servitude des fonds inférieurs, L'aggravation de la servitude " consiste dans toute modification ayant pour résultat de changer le cours normal " des eaux et d'en augmenter le volume naturel. Ainsi l'aggrgvation existe, " lorsque, par des travaux sur son fonds,le propriétaire supérieur donne aux eaux " un volume plus considérable ou leur impose un courant plus rapide. Cependant " on admet généralement qu'il n'y a pas d'aggravation de la servitude du fonds " inférieur par cela seul que le propriétaire supérieur dans l'intérêt de son " exploitation exécute des travaux qui ont pour résultat d'accroître le volume " d'eau coulant par la pente naturelle des eaux sur le fonds inférieur si d'ailleurs " il n'en résulte aucun dommage sérieux pour ce dernier. Ainsi le propriétaire " supérieur peut, pour la culture de son fonds, établir des sillons ou rigoles ayant " pour but de favoriser l'écoulement des eaux. Le tempérament qui vient d'être " indiqué, se fonde surtout sur une raison d'utilité agricole, et en cas de contes- " tations sur le point de savoir s'il est ou non, résulté des travaux un dommage " sérieux pour le fonds inférieur les tribunaux doivent appliquer par analogie " l'art. 645 C. C. et concilier les intérêts de l'agriculture avec le respect dû à la " propriété ".

Baudry Lacantinerie et Chauveau (Vol. 5 par. 824) says : There is aggravation, if the proprietor of the upper land gives to the water a more rapid current, or if, after having captured springs, he gives to the waters a more considerable volume, or if he sends on to the lower lands water brought through canals and aqueducts which have modified the natural disposition of the property. Or if after employing the waters for irrigation purposes, he sends them charged wit mud ("limon"). Any change in the form of the upper land having for its effect to modify the flow of waters, by, for instance, sending them to the west

(*l*) Sirey 1902, 2, 145.

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instead of the east, is an aggravation. But, says the author, it is recognized that whether or not there is aggravation in any particular case, is a question not of law but of fact, as to which the decision of the Judges of fact is final. In practice, says Baudry Lacantinerie *(m)*, the Courts, in appreciating the facts constituting aggravation temper their appreciation by certain considerations of equity, this the author justifies by the following argument: The natural destination of land is cultivation, and therefore the waters which flow from cultivated land may be looked upon as waters flowing naturally, through cultivation may have somewhat modified the direction which nature had given the waters (*n*). Thus he thinks the upper proprietor may make furrows ("sillons"),and even gutters on his land so as to facilitate the flow of waters. He may not however, by gutters for the drainage ("écoulement") of waters that interfere with the cultivation of his land, discharge such waters on to any other land but that which would receive them by the natural slope of the land *(o)*.

After justifying this departure from the principle of art. 640, in the interest of general utility and more especially of agricultural necessity, French text writers have found themselves confronted with the question of aggravation caused by buildings or other constructions erected on upper lands, not connected with agriculture.Laurent*(p)* and with him Demolombe*(q)* do not hesitate to extend the tempering principle to such cases. Land is intended to be built upon, says Laurent, as well as to be cultivated, and that interest must be considered; it would be arbitrary, he thinks, for instance, to prevent a land-owner from paving his yard because the result would be to send more water on to the lower land. Demolombe's general argument is that building like agriculture must have been fore-seen and therefore the natural consequences must be held to have been consented to in advance. Other authors such as Aubry and Rau *(r)* oppose

(*m*) Baudry Lacantinerie etChauveau No. 827, 828.
Cassation, 15 April 1868.. S. 68. 1. 395.
(*n*)Cass. 31st May1848.S, 48.1.716.
Cass. 7th Jan. 1895 S. 95. 1. 8.
Cass. 19th April 1886, D. 87. I. 208
Cass. 8th Nov. 1888, D. 88.2.215.
(*o*) Cass. 27th Feb. 1855, S. 56. 1.397.
Bordeaux, 24th April 1839, D. 39.2.177.
(*p*) Vol. 7, No. 370.
(*q*) Vol. XI, No. 39.
(*r*) Vol. 3, par. 240, Note 21.

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this extension of the power of tempering the text. When we come to buildings he considers there is no longer a question of general utility or agricultural necessity, but private interest, the text should be strictly applied. Baudry Lacantinerie (*s*) is also of this opinion. "Jurisprudence" he says, may have decided with the support of certain circumstances of facts, that the lower proprietor should submit to modifications resulting from certain works executed; but in principle, the proprietor who, in order to build ("élever les constructions") modifies the natural flow of waters and increases its volume, is no longer within the hypothesis of art. 640.

This difference of opinion illustrates the danger of departing from a principle established by a clear text of law to meet the requirements of any interest general or private, thus trespassing on the province of the legislature, whose role, and not that of the Courts, is to temper the rigour of the laws by amending them when it is shewn that they work harshly. Once launched into the course of concessions, it is difficult to stop. The spirit of the Jurisprudence is that as regard the first part of art. 640, the whole question should be considered as one of slope of the land; if such slope is not altered by works made on the upper land and the water which reaches the land after such works and in consequence thereof reaches it by the general slope, the lower proprietor is bound to receive it, even if as a consequence of the works the volume of the water flowing is increased, provided the servitude is not hereby aggravated in fact, and there is no aggravation in fact, in the absence of appreciable prejudice. If we take this to be the true spirit of the law, we of course cannot limit it to the case of rural lands, destined purely for cultivation. There cannot be two spirits to one text; once the spirit is ascertained, the text must be applied in that spirit all round, whether the lands are situated in a town or in the country, and are used for building purposes or for purely agricultural purposes. We however feel difficulty in accepting that such is the spirit in which the text should be applied. We rather agree with Laurent and Baudry Lacantinerie that the text as the

(*s*) Vol. V, No. 828.

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Legislator created it, clearly stands in the way of such a contention, and that to apply it in such a sense one must revert to the process which has been described as tempering the rigour of the text in applying it, as it is said the Roman Jurisconsults did, in favour of agriculture. Now, we have the greatest respect for the decisions of the French Courts of Cassation and Courts of Appeal, and we would certainly hesitate on a question of strict interpretation of a doubtful text to decline to act in accordance with a general consensus of opinion of those Courts; but we must hold that when we have text of law, on the one hand, and French case made law not interpreting, but practically tempering such text, we should apply the text of the legislature and not the case made law that tempers it. If we are wrong in taking up this position, our Court of Appeal (The Judicial Committee of the Privy Council) will set us right.

Now we must hold that the text is entirely opposed to the con ention that the lower proprietor should be compelled to receive any waters which, but for the hand of man would not have reached his land, whether those waters reach him by the natural slope of the land or not. It is a matter of strict legal right on his part to refuse to receive such excess, and the legislator in no way imposes upon him the condition that he must prove serious prejudice. We are not prepared to say that the bare fact that the hand of man has done something in connection with the flow of water, is sufficient to justify the rejection of the water, the volume and the slope remaining the same — thus, for instance, the water flowing naturally, forms itself into a channel, and by this channel discharges on the lower land, if the upper proprietor merely to facilitate the flow on his land, and to prevent inconvenience to himself by overflowing, paves the canal without however, adding to the quantity of water that passes through it, he does not, we think, necessarily infringe Plaintiff's legal rights. The case would then fall to be determined by application of the third parag. of art. 640, i. e. the Court would enquire whether this act does or not aggravate that servitude. A more rapid flow of the waters which in any case would have run through the canal, may or not be an aggravation, that is a question of appreciation of fact. The distinction

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between the two cases is evident and it is because it exists that we find it stated by one eminent French authority that the text as it stood on the morrow of its promulgation practically rendered cultivation of the upper lands impossible; it is for this reason that the French legislature stepped in to provide for certain special interests, and it is for this reason that the French Courts, exercising a discretionary power which they may possess, but which we do not, have practically modified art. 640 in the sense we have indicated.

From our point of view therefore, if by any of their works, the Board of Curepipe or its predecessors, have whilst generally respecting the natural slope of the ground, sent more water on to Plaintiff's land than he would have received but for those works, they have thereby added to the servitude; they have infringed Plaintiff's legal rights, and the Plaintiff is entitled to apply to the Court to have things set right. From the point of view of French Jurisprudence, provided the natural slope has been adhered to, any addition that may have been made to the quantity of water, can give rise to objection only on the condition that it causes serious prejudice. We propose examining the facts from both points of view. It is beyond dispute that refuse and sloppy waters (" eaux ménagères ") do not come within the scope of art. 640. They are waters which are originated by the hand of man, they do not and cannot flow naturally, and therefore the lower proprietor is not bound to receive them, to send such waters is not a mere aggravation of a servitude, it is the imposition of a servitude which the law has not created. As regards rain waters from the roofs of buildings art. 681 expressly prohibits sending them directly on to the neighbouring property, i. e. they must not go from the roof to such property, but if they drop from the roofs on the land on which the buildings stand and then flow naturally on to the lower land, they must be treated as ordinary rain water flowing from the land and are regulated by art. 640.

The next point to determine is what are the position and liabilities of the Board of Commissioners of Curepipe. The Board was created by Ord. 12 of 1889, and came into practical existence early in 1890. Art. 7 of the Ordinance provides that

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the Board shall, in relation to Curepipe, have power, to take measures for the making, management and maintenance and improvement of all roads, streets, footpaths, sewers, canals and other works of public utility, with the proviso that the Government shall continue to be charged with the management, maintenance and improvement of the road from Port Louis to Mahebourg, and all bridges thereon, including gutters but not including the footpaths along such roads (this proviso applies to Royal street, which is part of the road from Port Louis to Mahebourg); (*ii*) subject to the Rules and Regulations of the General Board of Health, then in force, or to be promulgated, to take measures for the cleaning and draining of the town, for the cleansing, ventilation and drainage of premises, water closets and privies, and generally the night soil service of the town. Art. 18 enacts; (*i*) that the provisions of all Ordinances and Regulations applying to declared villages shall apply to the town of Curepipe; (*ii*) that the powers exercised by the General Board of Health with regard to declared villages under Ord. 26 of 1875, 13 of 1877 and 17 of 1883 (*t*), shall be exercised within the limits of the town of Curepipe by the Board of Commissioners (this refers to Building Acts). Ord. 32 of 1894-95 creates the present Medical and Health Department, and art. 15 thereof vests in the Government all property vested in the General Board of Health. The Ordinance empowers the Sanitary Authority to call upon the Board of Commissioners to remove and abate nuisances in the town of Curepipe, and the officers of the Board have concurrent powers with the Sanitary Authorities to prosecute for breaches of Sanitary Regulations. Among the Sanitary Regulations in force when the Board of Commissioners was created and still in force is the following :— " Every yard and premises in a declared village (read in Curepipe) shall have such surface drains as are necessary to lead fluids into the nearest roadside drain or gutter; or, as regards rain water, into any other lower ground bound by law to receive the same and shall be provided with such other means as shall prevent accumulation of water or other fluids in any such yard or premises." As regards scrapings and house refuse, i. e. solid matter,

(*t*) rep. and rep. by the Building Act. of 1896.

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art. 8 provides that they are to be placed in boxes, bags or other receptacles for subsequent removal.

We do not consider that the question in whom is vested the ownership of the drains, gutters, etc. of the town of Curepipe, is of any importance, in relation to this case. It is sufficient for the purposes of the case that we should ascertain who have the possession, control and management thereof. These are clearly vested in the Board of Commissioners, with the important feature, that its powers with regard to cleansing and draining of the town etc. are subject to the Rules and Regulations of the General Board of Health. The Board is bound to receive in the street gutters the fluids which the Regulation just quoted compels the owners of premises to send into them. The term fluid covers everything liquid, and includes undoubtedly refuse and sloppy waters ("eaux ménagères").

The framers of the Sanitary Regulations of 1889 were apparently acquainted with the common law and were inspired by their knowledge thereof, for whilst they give to the owner of premises the option of sending rain waters on to such lower lands as are bound by law (art. 640 C.C.) to receive them, other fluids, such as refuse and sloppy waters which it is well settled law the lower lands are not bound to receive, must be discharged into the street gutters, which are under the charge of the Board of Commissioners. As a matter of law also, though the lower lands are not bound to receive directly rain waters from house roofs of other properties, the latter may be sent on to the public roads. But the fact that the Board must receive all waters sent from private premises, because it has charge of the public street drains and gutter, does not confer upon such Board the corresponding right of passing on those waters to Plaintiff or other proprietors. It can only transmit such waters as flow naturally from property across their roads to Plaintiff's land. Therefore, if it receives sloppy waters and other fluids (and it must receive them) it has no right to send those waters on to the lower lands upon which no obligation to receive them rests. The management and control of the streets, drains and gutters, and the powers of draining the town, must be exercised having regard to this principle. As regards rain waters from the yards,

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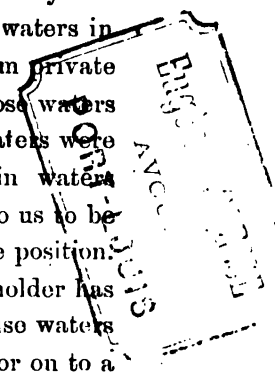
the utmost that can be said is that it may transmit such of them as would naturally have reached the lower lands : as regards refuse waters, and other fluids from private premises, it must dispose of them elsewhere. The Board must in fact so arrange its drainage system as to conciliate its obligations under the law and regulations to receive and dispose of waters, with the rights of private land owners upon whom no such obligation rests. If, therefore, it is found convenient or necessary to use one system of gutters and drains, for all the waters, i. e, for rain waters in whatever quantity and of whatever nature coming from private premises, and for refuse waters they must discharge those waters elsewhere than on private properties, which if such waters were separated, would only be compelled to receive rain waters flowing naturally from the lands above. This seems to us to be the plain logical common sense view to be taken of the position.



We need scarcely point out that, once the householder has complied with the law by sending his rain waters, refuse waters and other fluids into the public drains or gutters, or on to a public thoroughfare, his responsibility ceases. He cannot be held responsible for the direction they may subsequently take. They come under the charge of the Commune, Board or other Authority, charged with the control and management of the public thoroughfares, drains and gutters.

Passing to the facts of the case we find them to be as follows :— Plaintiff is not here in presence of the proprietor of premises situated above his land and claiming the natural outlet on his land for waters provided by art. 640 of the Code. The drainage of the town of Curepipe has been taken in hand first by the General Board of Health and subsequently by the Board of Commissioners for the town. A principal drain has been provided known as the Casino drain, into which discharge various other drains, canals and gutters ; these drains afford the owners of private premises the outlet required for their waters of every description, and those waters are continuously discharged into what has been described as a natural canal, originally created by the natural flow of waters from the upper part of the town, which crosses the properties of Rey, Gopaul,

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Plaintiff and others in the lower part of Curepipe and conveys them to the Rivière Sèche. The main drain has existed for many years, but the connecting drains and gutters are of more recent construction, in fact their construction has been gradual, and they have been repaired, altered and added to as occasion required. Curepipe formerly consisted mainly of marshy land ; as land was required for building purposes, it was drained, roads have been constructed or modified to meet the growing requirements of the town, and the aim of the authorities charged with such matters has been to drain the town in the best possible manner. It is evident that the rights of the owners of lands crossed by the natural channel referred to have not been considered as an essential factor in these drainage arrangements. The natural channel being a convenient outlet for the waters, it has been used for the purpose on the assumption that it could be lawfully put to such use. An attempt has been made to show what waters originally flowed naturally into this channel, creating it in fact, and that the only difference between the present position and the original position is that the flow of waters into it is now regulated by various drains and gutters whilst originally the flow was purely natural. Mathematical proof one way or the other is a matter of pure impossibility. The quantity of waters which passed by the natural slope of the lands above into the natural channel, before the hand of man interfered to regulate the flow, was not measured, so that there can be no precise comparison. No doubt waters do reach the channel through the drains, canals and gutters made by man, which would have reached it if those works had not been executed, whilst on the other hand it stands almost to reason, that water must reach it which would otherwise have gone elsewhere, or have stagnated or become absorbed or evaporated. We are satisfied on the evidence that both results occurred, whilst we have it established on the other hand, that certain works have been performed which, though their primary object was not to meet the convenience of the lower proprietors, yet have had for their effect to turn away waters which otherwise would have reached their lands. After careful consideration of the evidence, we are satisfied that at the time this action was entered,

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the position was such that Plaintiff received more waters than he would have received, had there been no interference with the natural flow, and that such increase caused appreciable inconvenience and therefore prejudice, but that since the action has been entered, the completion of certain works in connection with the rivers, has had for its effect to so alter matters that as a matter of fact, though the volume of water conveyed is somewhat in excess of that which would have flowed naturally, it cannot be said that it is so excessive as to cause very serious prejudice. We are referring here of course exclusively to the volume of the waters, abstraction made of their nature and quality. The servitude is undoubtedly aggravated in that respect and there is prejudice appreciable or sensible though it can scarcely be said to be very serious.

As regards, however, the nature and quality of the waters, the position is very different. We consider it proved that formerly the waters conveyed into the natural channel were ordinary surface waters, carrying with them such matters as earth, gravel, stones, in fact matters which rain waters flowing will and must gather and which must be received with them, but the waters were not as a rule polluted; of this there is superabundant proof. Subsequently, however, as the drainage works were perfected, the quality of the water was changed, it became positively filthy, and there is no doubt in our mind that this was due to the fact, that the Casino drain had become practically a main sewer for the upper part of Curepipe, receiving not merely surface waters, but refuse waters of every description. The nature of those waters showed itself most offensively when the waters overflowed the banks of the natural canal, and stagnated on the neighbouring land and the results were also made apparent lower down when a spring formerly used for various purposes became so tainted that the water could no longer be used. Of course the fact that the water could not be used is not a ground of action but it is material as confirming the evidence as to the offensive nature of the waters. The result of the drainage system as a whole was not merely to increase the volume of the water passing through the channel, and the rapidity of its flow, and to make the flow more continuous,

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but to so deteriorate the waters as to create a nuisance to the prejudice of those through whose lands the waters flowed. As a fact the waters were a mixture of surface waters and " eaux ménagères ", which latter in no case was Plaintiff bound to receive. All this constituted not merely a technical but a real aggravation of the servitude, it went further, it imposed a servitude which the law did not sanction. The nuisance to Plaintiff, we must say, is shown to have diminished of late years, first of all as we have seen a better regulation of the flow of waters has prevented overflow and consequent stagnation of putrid waters on Plaintiff's land, but still the aggravation and nuisance exist so long as refuse waters pass through Plaintiff's land. As a fact the refuse waters proper do not reach Plaintiff's land in dry weather. Their flow is insufficient to carry them so far, it is shown, and we have ourselves seen that they are spent a little below Curepipe Road station on the opposite side of the line, there the filth dries up, gets absorbed or evaporates if the drought continues. When it rains however, the refuse waters and all the greasy and noxious matters they contain, are carried on, diluted more or less according as the rain has been slight or abundant. In heavy rains probably their flow is sufficient to carry the filth through with a rush, leaving no time for deposit on the rugged banks or sides of the channel, but after slight showers or in ordinary rain the position is necessarily different, the dilution is less complete and the flow less rapid. Unpleasantness must be the result, and we are told has been the result. We are not prepared to say that sickness has been actually caused by the passage of the waters ; such cases of typhoid fever as have been mentioned have not been traced to this cause, but that the passage of such waters may in certain circumstances constitute a danger is possible. At any rate it is undoubtedly unpleasant, inconvenient and calculated to depreciate the value of property ; it, in our opinion, constitutes a sufficiently serious aggravation of the natural servitude to give just cause for complaint.

It is to be remarked in this reference that whatever may be said of the effect of Defendant's attitude as constituting an admission of Plaintiff's right to ask for the suppression of the

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nuisance caused to him by the drains, the fact of the existence of serious inconvenience to Plaintiff, and his neighbours, was never seriously contested before this action had to be met. Over and over again complaints in this respect have been referred to in official documents, and until they finally elected to take their stand on their strict rights, both the Sanitary Authorities and the defendant Board appeared not to seriously question the desirability of doing something to alleviate such inconvenience; reports have been called for as to the practicability of diverting the flow of water from the Casino drains from the lands of Rey, Plaintiff and others, and we even find on record a suggestion from the President of the Board that the best way of dealing with the difficulty would be to have underground pottery pipes. It has also been attempted to be shown that a distinct offer was made to pave and cement the sides and bottom of the natural channel on Plaintiff's land, as a provisional measure pending the consideration of a comprehensive scheme for drainage of Curepipe, as to which a report from the town Engineer was expected. All this points to the fact that whichever way right might point, a grievance existed from the point view of natural equity which there was a disposition to remedy if possible, and the great impediment appears to have been expense. The cause of that grievance exists, though, its gravity may have diminished. On the whole, leaving aside for the present the plea of prescription, we must find that there is aggravation of servitude legal and in fact resulting from the waters conveyed through Plaintiff's property by the drains under the management and control of the Defendant Board, and that unless Plaintiff makes good his plea that he had acquired by prescription the right of sending the waters now received by Plaintiff through the latter's land, Plaintiff has a good cause of complaint.

This brings us to the plea of prescription. The terms of the plea of prescription are as we have seen, that the Defendant has, at all events, acquired by 20 years prescription, the right of using the stream in question, (i. e., the natural channel crossing Plaintiff's property which Defendant calls a stream) for the discharge of such waters as are alleged to flow into it now, and further the right of diverting into such stream all such waters

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as are alleged to flow into it now. The law which regulates prescription of this kind is art. 690 C. C. and 691 C. C. and Ord. 12 of 1883 which reduces the long prescription for actions (art. 2262 C. C.) from 30 to 20 years. Servitudes which are " continues et apparentes " may be acquired by prescription, but servitudes that are " continues, mais non apparentes ", or " discontinues " can only result from title; even possession from time immemorial cannot confer a right to such a servitude.

Now the first point of fact to determine is what are the waters which Plaintiff alleges flow into the stream or channel crossing his land. He says that he receives, not rain water only, i. e., waters which flow whenever it rains, therefore continuously within the meaning of the law and which flow apparently, but also refuse waters from premises adjoining the town drains or connected therewith. To make good this plea therefore, supposing refuse waters in any shape, diluted with rain water or entire and separate, can be considered as waters flowing continuously and apparently, and can be the subject of prescription, Defendant must prove that since June 1883, i. e., 20 years before this action was entered, he or those in charge have uninterruptedly, publicly, etc., used the natural channel for the discharge of such waters. This proof we must hold, Plaintiff has failed to make to our satisfaction. Whatever may be said of surface waters, the continuous discharge of the kind of water that now passes through the channel has not existed for 20 years. In other words the said channel has not been used for twenty years, for the conveyance of the sewage which now passes through it. It has, we are aware, been decided by a French Court *(u)*, that though the right of sending filth from one property to another, cannot be acquired by prescription, if rain water falling from the roofs, flows in a gutter through a privy, and the filthy waters from such privy become mixed with such waters, the privy water merges into the rain waters and shares the fate of the latter as far as prescription goes, in other words the right of discharging the mixture is acquired by prescription. But even if we accept this view, (and if we could consider the circumstances to be similar),

(*u*) Sirey 1896. 2, p. 295—Court of Limoges 15th June 1891 and 23rd May 1894.

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the prescription still would depend upon proof being clearly made that the discharge of the mixture was carried on for twenty years. The decisions quoted clearly lay down the principle, on the other hand, that what is known as the servitude " d'évier ou égoût des eaux ménagères " is " non continue " and cannot be acquired by prescription, which is undisputed law.

Our decision on this part of the facts practically disposes of the plea of prescription and dispenses us from examining the issue of fact raised as to the existence for twenty years of a connection between the drain on the other side of the Railway opposite Rey's property, and the natural channel passing through Plaintiff's property, as to which evidence is conflicting *(v)*.

.....

It results from our finding in law and in fact, that Plaintiff has made good his claim that his legal rights have been encroached upon and that the encroachment should be put an end to. It further results from the view we have taken of the position of the defendant Board that he is justified in asking that the Board be ordered to put an end to the encroachment. The question now arises—what form our order is to take. If we were in presence of surface waters pure and simple, which in principle Plaintiff would have to receive in some quantity, in any case, but as to which he is not bound to submit to aggravation of excess on such quantity, or to prejudice caused by an increased flow, we would have been satisfied with directing the deepening of the natural channel, the paving and cementing of its bottom and sides, so as to prevent any future overflowing, and a sufficient bridging over of the channel, to secure proper communication between the two portions of Plaintiff's land, at all times. We may mention in this reference, that some such proposal has been stated by Dr Edwards and Mr Lamarque to have been made to Plaintiff and to have been refused. We are not satisfied that the proposal was made in such terms that Plaintiff must have understood it to be as stated. He denies that it was made, and it was not renewed in writing, when he

(v) The Judges expressed an opinion on that point as well. Proceeding to discuss the evidence they came to the conclusion that the Defendant failed to prove that the connection between the drain and the natural channel existed in 1883.

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took action by placing the Board *in morâ* to put an end to the encroachments on his rights. But we have, as we have stated, to deal with a mixture of surface and refuse waters, sewage in fact, which we have held, Plaintiff is not bound to receive. Possibly a paved and covered drain,in underground pottery pipes would afford a sufficient abatement of the inconvenience—this is however a matter of agreement. A a matter of strict right, Plaintiff is entitled to refuse to receive such waters either above or below ground, and as he insists upon his rights, we have no alternative but to order the only effective remedy, that is the suppression of the connection between the town drain and the natural canal crossing Plaintiff's property, in other words to order the Defendant Board to discontinue the discharge of these waters on the Plaintiff's property. This we order in principle, but as evidently the connection cannot be made to cease in a day, we desire to hear Counsel on the question of the delay to be fixed for carrying out the order.

We have next to consider the claim of damages. It has been urged that, as the Board, in making drains, performs a statutory duty, it cannot be held responsible for any damage caused by the performance of such duty. To this it has been successfully answered that the statutory powers possessed by the Board, are not to discharge sewage through private property, in defiance of the right of owners thereof, but to drain the town having due regard to the rights of individuals. We cannot admit the irresponsibility pleaded. Responsibility, however, is limited to the period of the Board's existence and administration, to the extent that it is not responsible for the faults of omission or commission, committed by Government Departments in connection with the drains, before it assumed the control. It is however responsible for the consequences of having continued to discharge the waters on the Plaintiff's property after Plaintiff had protested against this being done. It was its duty then, to put an end to the encroachment on Plaintiff's rights and if damage has been caused by the non-performance of this duty, it must make good the damage. That some material prejudice has been caused is certain. Plaintiff could not fully utilize the land on the other side of the channel, until

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assured against the floodings which practically cut off communication between the two portions of his property, and he has been necessarily inconvenienced by the passing of offensive waters on his property and in close proximity to his residence. In the absence of sufficient data to go upon, we cannot assess damages at the sum claimed—Rs 2,000, but we think that by allowing Rs 500 on that head we meet the justice of the case. That there exists a source of serious prospective prejudice, so long as the encroachment is not put an end to we have no doubt. So far Plaintiff has resided on his property; the inconvenience has been chiefly personal, but it is evident that the prejudice must take a different shape, if he desires to let or sell his premises. A property with an open sewer, or something tantamount to a sewer, passing through it within a few yards of the house, must necessarily compare unfavourably from the point of view of a purchaser or tenant with a property not so encumbered, but we do not consider that such prospective damage can be allowed in the present circumstances.

We have skilled opinions as to the respective merits of suggestions made by the Board's Engineer and the Engineer Naz respectively as to the best and cheapest way of diverting the waters so that they may reach "Rivière Seche" without crossing Plaintiff's land. We must decline to give any opinion as to these respective plans beyond stating that both appear to be physically possible—it is for the Board to select the means which will best suit its circumstances. We also say nothing as to the assertions that have been made that whatever may be the legal attributions of the Board of Commissioners, there has been a tacit agreement between the Board and the Sanitary Department, under which the latter attended to the drains. If the Board has any claim against the Government or the Sanitary Department, its rights remain entire. Plaintiff has tried the Government and has been referred to the defendant Board, and *quoad* him, the Board is responsible.

The Judgment of the Court is that the defendant Board is ordered to discontinue discharging waters from any of the drains of the town of Curepipe into the canal which crosses Plaintiff's land, from a date which will be fixed after hearing

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suggestions of Counsel, and that the Defendant do pay to Plaintiff a sum of Rs 500 and the costs of this case.

Attorney for Plaintiff *Ganachaud.*

Attorney for Defendant *Ritter.*

Record No. 29038.

April, 19;26

FORGES ET FONDERIES DE MAURICE *v.* THE COLONIAL GOVERNMENT

Customs — Customs Tariff — Ordinances 29 of 1895 and 17 of 1901 — " Local Industry " — Interpretation of Statute — Doctrine " Ejusdem generis ".

A Company carrying on in Mauritius the industry of manufacturing and repairing machinery in general, carries on a " *Local Industry* " in terms of item 96, sub-item i of Schedule B of Ordinance No. 29 of 1895, as amended by Ordinance No. 17 of 1901, and the machinery or apparatus imported to be used in such industry are liable to pay only the fixed duty of R. 1.10 c. per 1000 kilos.

The words "other local manufactures" in the sub-item should not be restricted to mean " manufacture of other local produce ".

Doctrine " *Ejusdem generis* " discussed ; *Anderson v. Anderson* (*x*) followed.

SPECIAL CASE drawn by agreement of both parties under Rule 77 of the Rules of Court; argued on *April 19th* by

Guibert K.C. for the Company and

Serret Ag. S.P.G. for the Government.

The judgment of the Court (Sir V. Delafaye, C.J. and Kœnig, J.) was delivered on *April 26th* by

KŒNIG, J.— This case, turns upon the construction of item 96 sub-item 1 of Schedule B of Ordinance No. 29 of 1895, as amended by Ordinance No. 17 of 1901, which runs as follows: " Machinery or apparatus for the manufacture of sugar, rum and aloe fibre, or for other local manufactures, or to be used in other local industries : by whomsoever imported.

Per 1000 kilos... ... ... R. 1.10"

The plaintiff company has imported two cupolas and accessories, for which it has paid, under protest, the sum of Rs 765. 36, representing the " ad valorem " duty provided by item 160 of the Schedule above quoted, plus the surcharge imposed by art. 1 of Ordinance No. 21 of 1904. It is admitted that the company carries on in Mauritius a certain industry, to wit : the manufacture and repairs of machinery in general

(*x*) L. R. Q. B. D. 1895 (I) p. 719.

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and that the two cupolas and accessories are to be used in their industry. The question is whether the company carries on a local industry within the meaning of item 96 above recited and whether as a consequence the sum of Rs 719.36, representing the difference between the sum of Rs 765.36 paid by the Company and the sum of Rs 46, which would be the amount of duty leviable under item 96 coupled with art. 1 of Ordinance No. 21 of 1904, should be refunded to the Company. There cannot be any doubt as to the literal interpretation of item 96: an industry carried on in Mauritius is a local industry and as the machinery imported is to be used in that industry, the item applies. But it is contended on behalf of the defendant that the literal interpretation should be rejected, 1o. because under the laws in force previous to Ordinance No. 17 of 1901, the machinery imported would certainly have been liable to the "ad valorem" duty, and there is nothing to indicate that in passing that Ordinance the legislator had any intention of reducing the customs duties, 2o. because in virtue of the doctrine which is known as that of *ejusdem generis(y)*, the sense of the general expressions "for other local manufactures, or to be used in other local industries" should be restricted to the sense of the specific words "sugar, rum and aloe fibre" and should therefore be taken to be "for the manufacture of other local produce or to be used in industries dealing in other local produce".

The provisions of the previous law, corresponding to item 96 now in force were: 1st, item 19 of Schedule C of Ord. 7 of 1878; 2nd, item 29 of Schedule A of Ord. 5 of 1886; 3rd, item 29 of Schedule A of Ord. 16 of 1886; 4th, item 96 of Schedule B of Ord. 29 of 1895. The first enactment provided a complete exemption; the 2nd and 3rd provided a duty of R. 1 per 100 kilos, and the 4th a duty of R. 1.10 per 1000 kilos, but they were all worded as follows: "machinery and apparatus for the manufacture or improvement of sugar, rum, or other produce of the colony". Those enactments would not have been applicable to such a case as the present one. The language of the new law is different, the difference being such that what

(y) Maxwell on Statutes, p, 405 et seq.

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would have been clearly excluded from the operation of the old law, has now become included within the terms of the new law. Is there anything in the new law to indicate that, with such a change in the language, the meaning has remained the same, in other words, that the reduction of one of the items of the Customs tariff would be manifestly absurd or repugnant to the intention of the legislator? We find no traces of any such indications. Literal interpretation is the rule *(z)* and to use the words of Jessel M.R. " Any one who contends that a section of an Act of Parliament is not to be read literally must be able to show one of two things, either that there is some other section which cuts down its meaning, or else that the section itself is repugnant to the general purview of the Act" *(a)*. " The onus of showing that the words do not mean what they say lies heavily on the party who alleges it. He must, as Parke, B, said in *Recke v. Smith* advance something which clearly shows that the grammatical construction would be repugnant to the intention of the Act, or lead to some manifest absurdity." Per Grove J. in *Richards v. Mc Bride (b)*.

The doctrine of *ejusdem generis* has been authoritatively discussed in the Court of Appeal in the comparatively recent case of *Anderson v. Anderson (c)*. As stated by Lord Esher at p. 752. " No doubt many cases are to be found in the reports in which the meaning of general words in deeds or wills has been thus limited. But I am not surprised to find that the modern tendency of the Courts has been to construe general words in their ordinary sense. It cannot, however, be doubtful that there are cases in which such words must be construed in a limited or restricted sense, and the question is how the rules of construction are to be applied. I will take first the rule as stated by Lord Eldon in *Church v. Mundy*. He said: the best rule of construction is that which takes the words to comprehend a subject that falls within their usual sense, unless there is something like declaration plain to the contrary. That is, as I understand him, *primâ facie* you are to give the words their

(z) Laurent, Vol. XVI, Nos. 502 et seq; Maxwell, pp. 2 et seq. Dwarris on Statutes pp. 583 et seq, 599.

(a) *Nuth v. Tamplin* L.R. Q. B. D. Vol. VIII p. 253.

(b) L. R. Q. B. D. VIII 123

(c) L. R. Q. B. D. 1895 (1) p. 749

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larger meaning, unless you find something which plainly shows that they were intended to be read in a more restricted sense." Again according to Rigby L. J. p. 755, "the doctrine known as that of *ejusdem generis* has, I think, frequently led to wrong conclusions on the construction of instruments. I do not believe that the principles, as generally laid down by great judges were ever in doubt, but over and over again those principles have been misunderstood, so that words in themselves plain have been construed as bearing a meaning which they have not and which ought not to have been ascribed to them. In modern times I think greater care has been taken in the application of the doctrine; but the doctrine itself as laid down by great judges from time to time has never been varied; it has been one doctrine throughout. The main principle upon which you must proceed is, to give all the words their common meaning, you are not justified in taking away from their common meaning, unless you can find something reasonably plain upon the face of the document itself to show that they are not used with that meaning, and the mere fact that general words follow specific words is certainly not enough". The cases cited by Maxwell (pp. 405 et seq.) deal with one general word following a more or less long list of specific words. In the present case we have to deal with two general expressions, and if we were to apply the *ejusdem generis* doctrine in the sense contended for by the defendant, we would not only be giving to the expression "other local manufactures" the restricted tense of "manufactures of other local produce" without any warrant for so doing except that the general expression follows specific words, but we would also be taking the other expression "or to be used in other local industries" *pro non scripto*, as it would be altogether superfluous. We must therefore hold that the Plaintiff carries on a local industry, that the case is governed by item 96 sub-item i of the tariff Schedule, and that therefore the amount of Rs. 719.36 should be refunded by Defendant.

Costs to be paid by Defendant—Supreme Court costs.)

Attorney for the Plaintiff *Léclézio.*

Attorney for the Defendant *Rolando C.A.*

Record No. 29862.

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April, 24 and May, 17.

CAVALOT *v.* DE CHALAIN

Lease — Resolutory Clause — Arts. 1183, 1184 and 1741 of the Code Civil — District Court Practice—Application for cancellation—Form of Order.

In the absence of a clear expression of intention that a lease shall be resolved "*de plein droit*" in certain events the implied resolutory clause of art. 1184 of the Code Civil should govern the question. No specific words are required to convey that intention.

Held that a clause enacting that in default of payment of 2 months' rent, the lessor should have the right to resume possession of his property, without notice carried "*résolution de plein droit.*"

On proof made of the non-payment, the Court cannot but declare, if asked to, that the lease is cancelled. An application that the Court should *order* the cancellation is unnecessary, but does not alter the position.

APPEAL against a decision of M. Noël Esqre., District Magistrate of 1st Division, Port Louis, ordering payment by defendant, now Appellant of five months' rent of certain premises and the cancellation of the lease.

The Appeal was argued before Brown and Davson, JJ. on *April 24th* by *Sir W. Newton K. C.* for the Appellant and

Delafaye for the Respondent.

The grounds of the appeal and the points discussed appear sufficiently from the judgment delivered on *May 17th* by

BROWN, J.—The Appellant in this case was the tenant under lease of certain property. The lease contained a clause to the following effect: "Il est entendu qu'en cas de non-paiement de deux mois de loyers Madame de Chalain aura le droit de reprendre sa propriété sans aucun avis judiciaire". The tenant not having paid five months' rent, the lessor sued him for the rent due and at the same time applied for the cancellation of the lease. The defendant first pleaded payment of the rent and resisted the application for cancellation. Subsequently a second plea was entered to the effect (1) that Defendant had performed his part of the contract and it was through Plaintiff's fault that Defendant had not performed it sooner (2) that the sum claimed had been paid before the service of the plaint. After hearing evidence the Magistrate found for the Plaintiff in terms of the plaint. This judgment is now appealed from on the ground that

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in the circumstances of the case the Magistrate should have given judgment for the rent, and should not have pronounced the cancellation. As a matter of law it is submitted to us that the resolutory clause in the lease does not state in express terms that the lease shall become cancelled " *de plein droit* " upon the expiry of two months without payment of rent. In the absence of such clear expression of the intention of parties, the resolutory clause has the same effect as the resolutory clause which is understood in all synallagmatic conventions, arts. 1183, 1184 and 1741 Civil Code. The cancellation in that case must be applied for to the Court, and it is competent for the Court to grant a delay for the performance of the obligation, or to pronounce the cancellation.

It is well settled law that unless the resolutory clause conveys clearly that the resolution is to be " *de plein droit* " the application must be made in Court, and art. 1184 applies. On the other hand it it equally settled law that there are no sacramental terms required to convey the intention of parties that the contract will be cancelled " *de plein droit* " in default of the performance of certain obligations, that is the parties may use any terms they like, and it is for the Court to determine what was the real intention of parties as conveyed by those terms. The words " *sera résolu de plein droit* " need not be used. Now we hold that if the parties to a lease state that if two months' rent remain unpaid the lessor should have the right to resume possession of his property without notice, this necessarily implies a cancellation " *de plein droit* " of which the lessor is free to avail himself or not, for he could not resume possession were it not so. Of course he will have to go before the Court to have the fact determined that two months' rent have not been paid, but once that fact settled, the necessary consequence is his resumption of possession of the subject leased if he applies for it, and the Court cannot refuse its sanction to the agreement in that respect.

It is true here the lessor asked the Court to order the cancellation; this was unnecessary, we hold; it would have been sufficient to ask the Court to declare the lease cancelled — the

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form of action adopted, we consider does not alter the position. We hold that the Magistrate could not have refused to sanction the cancellation under the circumstances. Assuming that we had not been able to give this hard and fast effect to the conventional resolutory clause, we would still have declined to interfere with the judgment of the Magistrate. Whether the lease was cancelled " de plein droit " or not, it is the clear intention of parties that it should rest with the lessor to terminate it if rent was not paid for two months, and the Magistrate must have had very strong cause shown to him to induce him to refuse to sanction the cancellation when it was formally applied for if satisfied that as a fact the rent had not been paid. After careful consideration of the facts disclosed in the evidence, we find ourselves unable to see sufficient ground for interfering with the discretion exercised by the Magistrate in this matter.

Appeal dismissed with costs.

Attorney for Appellant *Tranquille.*

Attorney for Respondent *Ducasse.*

Record No. 1176.

May, 3, 17

DE PITRAY *v.* COLONIAL GOVERNMENT

Damages—Railway Accident—Teeth lost.

Rs. 250 damages allowed for loss of two front teeth, the result of a Railway accident.

CLAIM of 2000 Rupees against the Colonial Government for loss of two front teeth, broken in a Railway collision. The facts and the liability of Government were not disputed. Rs 250 were tendered and refused.

Argument on *3rd May* by *Guibert K.C.* for Plaintiff and *Serret Ag. S. P. G.* for the Government before BROWN and DAVSON, JJ.

Judgment was delivered on *17th May.* The amount tendered was held sufficient but no order was made as to costs.

Attorney for Plaintiff *Guibert.*

Attorney for Defendant *Rolando C.A.*

Record No. 29789.

LAURENT *v.* BREBNER & ORS

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Feb. 6, 7. 14, 15, 27, 28
March, 1, 6, 7, 8
June, 19.

Defamation — Defences to action in damages — Justification — Character — Reputation— Art. 288 of Penal Code— Provisoes i and ix— Evidence— Hearsay— Good faith—Damages.

The defences constituted by the provisoes to art. 288 of the Penal Code are competent defences to a civil action in damages. *Le Cernéen v. Laurent* (1901) followed.

The defence under proviso ix justifying imputations on the *character* of a person, when the imputations are made in good faith for the interests of the person making it or for the public good, is expressly confined to imputations on *character* and is inapplicable where charges of negligence, carelessnes or ignorance are brought against a medical man.

Good faith or absence of motive though not material to the right of action against a Defendant who pleads justification, may yet have an effect in reducing the damages.

Circumstances under which Rs 2,000 damages were awarded against the Defendants to an action for defamation with caption of the body limited to six months.

Defendant was allowed to depone to the opinion which a medical man had expressed to him of Plaintiff's mode of treatment, not as evidence of the merits or demerits of that treatment, but as bearing on Defendant's plea of good faith.

ACTION in Rs 10,000 DAMAGES for DEFAMATION.

Jollivet and *Laurent* appeared for Plaintiff.

Sir W. Newton, K. C. (*Delafaye* with him) for defendant Brebner.

Esnouf for defendants Newton and wife.

The nature of the case and the arguments appear sufficiently from the judgment.

The judgment of the Court (BROWN & DAVSON, JJ.) was delivered on *June 19th* by

DAVSON, J.—This is an action at the instance of Dr Eugène Laurent, a doctor of medicine practising in this Colony, in respect of certain alleged defamatory letters and articles which appeared in the *Petit Journal*, a daily paper published in Port Louis, of which the defendant Charles Newton is editor and the defendant Blanche Bestel Newton is owner and printer. Three letters appearing in the issues of (i) the 14th and 15th, (ii) the 16th and (iii) the 17th September 1904 were written by the defendant C.W. Brebner, in English, and on the 19th September appeared an article in French commenting on those letters, and

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on the 20th, 21st and 22nd were published French translations of them.

Captain C. W. Brebner is a master mariner and resided, when not at sea, with his wife at Rose Hill. The letters relate to the illness and death of his wife and bring grave charges against Plaintiff in his medical capacity as the physician who visited and prescribed for her on the 5th September 1904, three days before her death. In the first letter the writer refers to the task he is about to undertake as one which many would shrink from, but says "I morally believe it is for the good of all"; a little further on he says:

"In my extensive travels, I have never known a country so averse to modern "science and one that clings with so much tenacity to archaic principles which "more or less interfere with the progress of persons and things. I have adopted "this mode of introducing my subject as it has a moral".

After some further introductory matters the letter proceeds:

"On Sunday the 23rd the deceased had a sudden and severe attack of acute "rheumatism or in medical language rheumatic fever; mistakes followed mis- "takes until it ended fatally. Having occasion to be dissatisfied with the first "physician, we dismissed him at an early stage and need not refer to him "in connection with after results. My next step was to secure the best medical "aid possible, and as I go on, my reader will see how I have succeeded. "A noted Doctor was called in at 2 p.m. on Tuesday afternoon the 5th, this "gentleman prescribed, and as he was leaving without any instructions for the "immediate future, I asked if there was any danger. As for danger, said he, there "was none; Madam would be convalescent in eight or ten days. He also left us "in this delicate position, that we could not depart from his line of treatment "whilst his medecine lasted. Neither a physician nor a consultation of physicians "arranged for until other symptoms developed. Forty-two hours after, alarming "symptoms appeared which caused me to call in Dr Naz hurriedly; it was then "and only then that our true position was made known to us. He pointed out to "us that mistakes had been made from the very beginning, and expressed "his astonishment at what had been done and also informed me that "my wife was rapidly being consumed by the malady, and that she could not "possibly live another twenty hours. After the second dootor had given his "assurance of a speedy recovery and left us, the malady intensified rapidly. It "followed its natural course towards the heart and when it reached the organ "death speedily supervened. To Dr Naz my thanks are due; when he began to "adopt measures to protect the heart, it was too late; however he remained with "us until midnight when nothing more could have been done, bid good bye to "his dying patient and left us to watch for the final end. It is with feeling of "astonishment that Dr Laurent should have given the assurance that there was "no danger, when it is well known to medical men that acute rheumatic fever

"from its natural tendency to affect the heart must always be regarded as "serious."

The plaintiff, Dr Laurent, is not mentioned by name until the close of this passage, but it is clear and undisputed that he is the "noted doctor" who was called in, and that it is against him that the strictures are directed. The writer then quotes from a medical work dealing with rheumatic fever and emphasizing the necessity of treating the illness as serious, and carefully watching its progress. The letter of the 16th consists largely of further quotations from a medical work in which reference is made to the possible danger of such drugs as salicylate of soda (the main ingredient in Plaintiff's prescription) where cardiac complications exist, and of the alleged opinions of unnamed medical gentlemen in India with whom the writer had discussed the case, to the effect that salicylate of soda should not have been employed; the letter then proceeds:

"Dr Laurent not having returned on the following day to see the result of "his prescription, I have every right to publish it for explanation. I cannot wait "until the day of judgment to have this precious document explained.

COPY

Salicylate of soda.....grs. 20
Orange syrup.....tea spoonful
Distilled water.....table spoonful

mixed up to sixteen doses; to be taken one table spoonful every three hours between meals.

Carbonate of Lithine: three grs. divided into twelve packets one packet in soda water morning and evening; Vichy water: three bottles.—

"Sixteen doses thrice daily would run into five days and over; as a matter of "fact my wife died before the half was taken. Thrice between meals is obscure; "he might have informed me how these meals were to be divided and if the meals "were to be curry and rice, the cherished dishes of this country. My medical "work of reference says: Throughout the whole of an attack of acute rheumatism "low diet, no meat and abstinence from stimulating liquors is necessary. In "concluding this portion of my subject I appeal to my critics to study well the "prescription and the requirements laid down by Moor and Roberts, and then "give their unbiassed opinion."

The letter of the 17th begins by what is called a "contribution" from a "well-known physician in India" whose name is not given, dealing with the diagnosis and treatment of rheumatic fever, and then goes on:

"It has been argued that if a Doctor is called in to attend a sick person, and "after examination certifies that there is no danger to be apprehended, if the

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" person dies, the Doctor is not responsible either on the Civil or on the Criminal " side. It is considered an error of diagnosis; this is of course if no negligence " exists. If the Doctor is negligent, (legally negligent) then he is answerable to " damages, but negligence is often difficult to prove. The latitude given to doctors " over our lives is used with discretion by many and abused by others. I have " materials in hand to show where doctors have been heavily fined for malpractice. "The responsibility of a physician is well defined in Cooper's medical jurisprudence, " 1901; it says: when a medical practitioner is summoned to attend a patient he " enters into a sort of agreement the moment he undertakes to treat the case, " until his services are no longer required by the patient. The patient also " enters into a contract with the practitioner, and that is to pay the honorarium " of the physician so long as his services are required. This brief outline between " parties is sufficient for the present although I have abundance of materials " to mature the case. If my memory serves me right Dr Laurent has, on " various occasions evinced other medical men's supposed errors. I believe the " outbreak of plague was a case in point. I have no doubt that he based " his actions on humane principles and the welfare of the public. If he " still possesses the same tender feelings he will not refuse to answer through " the same medium, a few honest questions I am about to put to him.The council " of my legal and medical friends who sat in this case with me in Bombay has " concluded that after the first physician's treatment was cancelled by Dr " Laurent, the latter took upon himself the responsibility of the deceased who " was then lying prostrate with an insidious malady and suffering indescribable " agonies. They utterly failed to understand why he did not then and there make " even a feeble attempt to protect the heart; why he did not inform her relatives " of impending danger; why he did not inform them of temperature and of any " extraordinary rise indicating heart affection to be at once communicated to " him; why he did not arrange for a visit the following morning and a succession " of visits until he assured himself that his patient was out of danger or otherwise. " These are honest questions, neither he nor any person can take any exception to."

The article in French on the 19th September was not writen by captain Brebner but is in the nature of an editorial, and it practically endorses the attitude assumed by captain Brebner towards Plaintiff. There can be no doubt that these letters are defamatory: while it is not always easy to separate imputations of fact from comment, it is clear that the letters charge Plaintiff as matter of fact with having neglected and abandoned the patient whom as alleged by the writer, he had undertaken to attend, with repeated mistakes resulting in the death of the patient, and particularly with the careless or ignorant use of the drug salicytate of soda, and at least suggest that he has been guilty of malpractice. The letters imputing as they do facts prejudicial to the reputation — the medical repu-

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tation—of Plaintiff would be punishable under art. 288 of the Penal Code, and it follows that their publication constitutes an unlawful act upon which a civil action for damages may be founded. There are certain defences set forth in the provisoes to art.288 and numbered from (i) to (xi) on which an accused person may rely, and these, on the principle recognized in *Le Cerneen v. Laurent (d)* are competent defences in a civil action, and are therefore open to the defendants in this case. They rely practically on two of them, Nos. (i) and (ix). Certain other defences appear on the pleadings but they were not relied on in argument and properly so as they are quite untenable. The text of the articles referred to provides that no offence is committed when the writing or words "(i) impute anything which is true concerning any person, if the publisher can show that it was for the public good that the imputation should be published", or "(ix) amount to an imputation on the character of another, provided that the imputation be made in good faith for the protection of the interests of the person making it, or of any other person, or for the public good".

It will be convenient first to deal with the latter defence which, in our opinion, is inapplicable to the present case. It will be seen that while the offences made punishable by art. 288 include imputations on the *honour, character* or *reputation* of any person, the defence constituted by proviso ix is expressly confined to imputations on the *character*. Now the terms "reputation" and "character" are no doubt used colloquially and even in print, in a somewhat loose manner, and sometimes as being synonimous, but we are here dealing with an important enactment and must assume that when the legislature expressly confined the operation of this proviso to imputations on *character*, it meant something thereby and that it distinguishes between character and reputation. It would be rash, and happily it is not necessary to attempt anything in the shape of a definition of either of these words, but we are at least clear on this point, that these publications amount to very much more than an attack on Plaintiff's character; they are avowedly a warning to the public against a practising physician who,

(d)S.C. 1901 p.51.

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according to the writer, has been responsible, through carelessness, neglect or ignorance, or all three, for the death of his patient. This being so, the defence under proviso (ix) is inapplicable and defendants must fall back on that constituted by proviso (i). If therefore, they can prove that the imputed facts are true and that their publication was for the public good, they will be entitled to judgment; if they fail in that proof as regards any one of those imputations they will be liable, *pro tanto* to damages.

(After discussing the evidence the judgment proceeds :—)

Having thus reviewed the main facts in the case and the evidence of the medical witnesses as bearing on these facts we are in a position to answer the question " How do Defendants stand as regard their plea of justification ? ", the plea by which as already pointed out, they must stand or fall. As regards the imputation of abandoning the patient this has not been made out; we find, as already stated, that Plaintiff undertook to pay one visit and one only,and there was no obligation on him, moral or legal to return. As regards the imputation of the careless or ignorant use of salicylate of soda, the attempted proof fails entirely; the medical evidence on both sides is overwhelming that Plaintiff's prescription was not only not improper, but was a good one; it was the classical remedy for rheumatic fever and Defendants have not satisfied us that when the prescription was given there were any complications which marked the case as other than any ordinary one. We have not overlooked that part of the medical evidence which relates to what is known as Bouilland's law, i. e. that when several joints are affected and the inflammation is intense, the heart is generally affected, but there are admittedly exceptions to this rule, (Dr E. Pépin says : " cardiac complications are the rule and their absence the exception ") and while the Defendants, on whom the onus lies have not shewn that this case was not an exception, the evidence of Plaintiff whose examination, as we have held, was sufficient to enable him to detect any cardiac complications if such existed, goes to shew that they did not here exist, and this view is as we have said, corroborated by the prescription of doctors E. Pépin and Naz. In short the Defendants have failed to show

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that the diagnosis was incorrect or the treatment improper, the Plaintiff's error, if any, was his omission to put Captain Brebner on his guard as to possible future complications, and with this point we will next proceed to deal; but before leaving the question of Plaintiff's prescription, we ought to say that, though the Doctors are not unanimous on that point, some of them are of opinion that salicylate of soda may properly be given even in cases of incipient endocarditis, and further it must be borne in mind that Plaintiff's prescription included carbonate of lithia which, we are told, has a protective effect on the heart in rheumatic fever by eliminating the toxine and uric acid.

We now come to a point on which much stress was laid by the defence, namely the action of Doctor Laurent in assuring Captain Brebner that there was "no danger" and that the patient would be convalescent in a few days, and then leaving the house without any warning as to possible future complications. Plaintiff's counsel contended that there was no mention in the letters of this failure to give warning; but we think this issue is fairly raised in the pleadings, and that it was properly gone into: this is, presumably, one of the alleged "mistakes" referred to in the passage quoted above. Precisely what meaning is to be attached to the word "danger", whether it includes the possibility of future complications, or whether, as contended for Plaintiff, it means immediate danger of death. is a question not easy to determine, but in this particular case we think that even if we accept Plaintiff's view on this point, he should have accompanied his assurance of "no danger" with a caution. This is a point on which the medical witnesses are not quite in agreement; it is, however, not purely a medical question, but one on which a layman is competent to form an opinion. Now, while it is indisputable, in view of the medical evidence, that as regards life and death the diagnosis in rheumatic fever is favourable, the percentage of death, particularly in Mauritius, being very small indeed, it is also a fact that the disease often gives rise to serious complications which though rarely fatal result in seriously and permanently impaired health; further this was a case in which, in view of Bouilland's law already referred to, it was of great importance to be on the watch for

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cardiac complications. It may be said, on the other hand, that Plaintiff may very well have thought that in dealing with a a man of Captain Brebner's experience and intelligence any such caution was unnecessary; he may have assumed that if the state of the patient became more serious, Captain Brebner would, as he did, summon one of the five or six medical practitioners who lived near him. It is however better in such cases not to assume anything, but to take every precaution. No one in his senses would contend that it was Plaintiff's duty to alarm the patient or even his relatives by enumerating the various and formidable sounding complications which might ensue; but surely it would have been wise and proper to tell Captain Brebner to watch the patient carefully and in the event of a rise in temperature or other serious symptom to call in a medical man without delay, and in failing to do so, we think that Plaintiff was in fault.

These are the more important matters dealt with in the letters; there are some minor criticisms directed against Plaintiff, e. g. the alleged obscurity of the order that the prescription should be taken thrice between meals and the absence of any instructions as to diet. Dr Laurent says he did give careful instructions as to diet, but however this may be these are charges which, taken alone, are not very damaging or defamatory. Doctors are not always as specific in their instructions as to the hours of taking medicine, as anxious patients or their friends might wish, but surely if there is any obscurity on this point or if advice as to diet is required it is easy to ask for the desired information. It follows from what has been said that as regards the allegations against Plaintiff of neglecting and abandoning his patient the defence entirely fails; il fails also as regards the imputations of mistakes in the treatment of the case particularly as to the ignorant or careless use of salicylate of soda; there is, in short, no evidence on which a charge of malpractice could be justified. This being so, it is not necessary to go into the question whether, if these imputations had been true, their publication would have been for the public good; nevertheless a word on this point may not be out of place. Il may not unreasonably be said that if a medical man were to be

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guilty of grave ignorance, carelessness or neglect in the treatment of a case it would be the interest of the community in which he practised that his shortcomings should be made public, but such extreme cases are happily rare and if every person who thought he had a grievance against a medical man on account of his treatment of a case could with impunity rush into print and air his grievance to the public at large, such a state of affairs would be intolerable and would certainly not conduce to the public good as no man with any self-respect would consent to practise in a place where such a state of things was allowed.

Counsel for the Defendant Brebner in the course of his argument suggested that if Dr Laurent had shewn some consideration for and sympathy with Captain Brebner when the latter attempted to speak with him after Mrs Brebner's death, the publication of the letters would never have taken place, and with this we are very much inclined to agree. A sympathetic attitude on Dr Laurent's part, would, probably have avoided the necessity of these proceedings, but the fact that he did not adopt this attitude did not entitle Defendant to defame Plaintiff in the public press. No doubt Captain Brebner was in great distress, and our first impression would be that good feeling would have prompted a kind reception on Dr Laurent's part. When however we remember how he was approached by Brebner there is something to be said on the Doctor's side. Captain Brebner says: "I told him that I held him responsible for Mrs Brebner's death, and that I was about to publish her brief illness and death." Now when a medical man is told that the person addressing him is about to publish a statement holding him up to the public as responsible for the death of his patient, it does not seem reasonable that he should be expected to take the threat, to use a familiar expression "lying down". It is not unnatural that he should say: "If you do that I will prosecute you" and even if he were inclined under the circumstances to make allowances, it might occur to him that a conciliatory attitude would be open to misconstruction in view of the direct accusation which had just been made against him. However this may be, Dr Laurent's reception of Brebner does not affect the legal aspect of the case.

It is greatly to be regretted that Defendant Brebner who no doubt felt deeply the loss of his wife, did not take some sound advice before publishing his letters. The layman who embarks on a criticism of the treatment of a case by a medical man

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on the strength of certain passages from medical text books which seem to him applicable, courts disaster; the books may be standard works, the passages selected may be unimpeachable, but unless they fit the facts to which they are applied, they are only misleading. To take a concrete example; "it may be perfectly true to say of such drugs as salycilate of soda that they may prove highly dangerous if the action of the heart is much weakened or embarrassed," but this statement is absolutely irrelevant by way of criticism where no such cardiac conditions are proved to have existed or to have been indicated at the time the drugs were prescribed. But it may be said that Defendant in this case not only relied on books, but fortified himself with the opinions of certain persons in India such as the " medical council " as he terms it, who, as Brebner said in evidence, all came to the conclusion that Dr Laurent was to be blamed. Here he was on ground still more unsafe: In such a case as this a council suggests a responsible body of persons duly constituted by some proper and independent authority to deliberate on the matter submitted to them, and after hearing *both sides*, to arrive at an impartial decision; whereas here we have a body of two ladies and two gentlemen of whose credentials we know little or nothing, invited by Brebner whose avowed object it was to denounce Dr Laurent to the Mauritian public, to express an opinion on his treatment, on the *ex-parte* information furnished to them by Brebner himself. A greater travesty of impartial enquiry it would be difficult to conceive; a single instance will suffice to indicate the fairness or otherwise with which the facts were laid before them: Captain Brebner tells the public that they (the council) blamed Plaintiff for cancelling the treatment of Dr Pépin, and the censure was based on what Captain Brebner had told them. Now, what are the facts. The only part of Dr Pépin's treatment of which Plaintiff was informed by Captain Brebner other than the soothing draught was the local external application, and not only did he not cancel this, but he expressly approved of it. Dr Pépin's prescription (E) for internal use was not shown to Dr Laurent so that he could not possibly have " cancelled " this, but as a matter of fact the treatment of Dr Laurent was on the same lines as that of Dr Pépin, each of them having diagnosed an ordinary case of acute rheumatism without complications. For the position in which Defendant Brebner finds himself he has greatly to thank those advisers of his who consented to sit in judgment on a medical practitioner, without

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having at their disposal any of the materials on which a sound judgment could be arrived at. Thus far we have not touched on the question of "good faith" because this is not material to the right of action where the defence is one of justification. Odgers (*e*) says: as a rule unless the occasion be priviledged the motive or intention of the speaker is immaterial to the right of action... But in all cases the absence of malice, though it may not be a bar to the action, may yet have a material effect in reducing the damages. Plaintiff is entitled to reasonable compensation for the injury received, but if the injury was unintentional or was committed under a sense of duty or through some honest mistake, clearly no vindictive damages should be given. The principle here laid down is applicable to the present case and it is therefore necessary to consider the question of "good faith" for the purpose of assessing the damages and also as regards the questions of enforcing the judgment by caption of the body.

This part of our task is not difficult and may be disposed of shortly. We find it absolutely impossible to say that in writing the letters the defendant Brebner was actuated wholly by a desire to benefit the public. There is evidence both intrinsic and extrinsic which unmistakably points the other way. The letters impress us, and must we think impress every impartial reader, as displaying a strong personal animus against Plaintiff, and this impression was confirmed by extrinsic evidence furnished by Defendant himself in the witness box. At the very outset of his evidence he speaks of "the cruel and inhuman treatment tendered to me by Dr Laurent when I interviewed him on the subject of my wife's death" and later on he said: "I wanted a verdict from the public". This is not the attitude of a man whose sole concern is for the public good; it is clear beyond question that the Defendant, believing no doubt he had a strong grievance against Plaintiff, was actuated by a desire to damage him in the eye of the public.

Defendant Charles Newton is not quite in the same position but we must not overlook the fact that he did not confine himself to the admission of the letters to his columns but wrote or at least is responsible for editorial comments on those letters which endorse the strictures contained in them and indicate (though to a less extent than the letters) an animus against Plaintiff. These considerations would justify damages which, according to the classification of Odgers, would come under the

(*e*) p. 317, 2nd Edition.

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category of vindictive damages: We think, however, that the justice of the case will be met by an award of substantial damages, and these we assess at two thousand Rupees against the three Defendants jointly and severally with costs and with caption of the body against Defendant Brebner and Charles Newton, limited to six months.

On *March 7th*, the following judgment on a question of evidence was delivered by

BROWN, J.— Upon the question being put to Defendant whether Dr Naz called to see his wife after she had been seen by Plaintiff, had expressed an opinion as to the diagnosis or treatment of the latter and what such opinion was, Counsel for Plaintiff objected on the ground that such would be hearsay evidence. To this it is answered that if it is hearsay evidence of the fact that Dr Laurent's diagnosis and treatment were defective, it is admissible to prove that Defendant acted upon an opinion expressed by a competent medical man when he wrote that Dr Laurent had made mistakes and that he acted therefore in good faith. Viewed in this light, it is contended that evidence of the opinion expressed by Dr Naz is not hearsay evidence, but merely evidence of the fact that he expressed the opinion.

Clearly, it is not competent to bring Dr Naz's opinion before us second hand to prove Dr Laurent's error, but if it is competent to show the grounds upon which Defendant proceeded when he wrote the alleged libel, evidence is admissible to prove the fact that he acted upon medical opinion, and what that opinion was. We allow the question exclusively on this latter ground with the proviso that the statement made by Dr Naz to Defendant cannot be used to prove error on the part of Dr Laurent, and under further reservation as to the effect any proof of good or bad faith on the part of Defendant will have upon the issue of this case.

Attorney for Plaintiff *Chaillet.*

Attorney for Defendant Brebner *Tranquille.*

Attorney for Defendants Newton & wife *Ganachaud.*

Record No. 29361.

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July, 1

(IN THE BANKRUPTCY COURT)

SACHEDINA *v.* JACKARIA

Bankruptcy— Minor— Emancipated minor — Trader — Ord. 23 of 1887 arts 2 and 130 (3).

Any minor may be made a bankrupt. Art. 130 s.-s. 3 of Ord. 23 of 1887 does not apply only to an emancipated minor who has traded contrary to art. 2 of the Code of Commerce.

OBJECTION by a Respondent to a BANKRUPTCY PETITION that, being an unemancipated minor, he is not amenable to the Bankruptcy Laws.

Sir W. Newton, K.C. for the petitioner in Bankruptcy.

Jollivet for Respondent.

Judgment was delivered on *July 1st* by

DAVSON, J.— This is a Bankruptcy petition against Ismael Jackaria. At the hearing of the petition Mr Jollivet on behalf of Ameerun Dulloo as guardian of Jackaria, who is alleged to be a minor, moved that the petition be dismissed on the ground that a minor cannot be made Bankrupt. The matter is governed by sub-section 3 of art. 130 of the Bankruptcy Ordinance which is as follows: "A trader shall be liable to be made "Bankrupt even though such trader be a minor and has traded "contrary to art. 2 of the Code of Commerce". Mr Jollivet contends that the sub-section applies only to an emancipated minor who has traded contrary to art. 2 of the Code of Commerce, and Sir William Newton for the Petitioner contends that it includes all minors who engage in trade.

The sub-section is very unhappily worded and is I think capable of either interpretation. If it had read "though such trader be a minor who has traded contrary to art 2 &a.", Mr Jollivet's position would have been stronger: If, on the the other hand, it had read "though such trader be a minor or an emancipated minor who has traded contrary "to art. 2 &a." then petitioner's petition would have been unassailable. Mr Jollivet relied strongly on the argument that the expression "a trader" cannot possibly include a minor, because, by the law of the Colony, a minor is under certain

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disabilities which render it impossible for him in his own name to conduct a trade with all its incidents, this contention struck me as having considerable force, but it is open to the objection from the point of view of the Respondent (the debtor) that it goes too far, for it is equally applicable to the case of an emancipated minor "who has traded contrary to art. 2 of the Code of Commerce," for such person is under a very distinct disability, as that article expressly forbids him to "commence operations" as a trader, until he has qualified himself in the prescribed way. If, then, the expression "a minor" in art. 130 includes, as it clearly does, an unemancipated minor who has not so qualified himself, it is clear that it may include all minors, in other words, if the Bankruptcy Ordinance can modify the law as regards the one it can modify it as regards the other.

The interpretation clause of the Bankruptcy Ordinance which refers us to the first Schedule seems to leave the question open. It gives a list of persons who are deemed "traders" and continues "and also all persons deemed traders by the Code of Commerce". It may be contended, and I understand it to be Mr Jollivet's contention that the passage quoted qualifies the whole of what has gone before, i.e. that to be "a trader" it is not enough that a person does as a matter of fact carry on a trade, as the alleged [illegible] in this case has done, but he must be a person who is under no sort of disability: grammatically I do not think the passage will bear this construction: the words "and also" clearly indicate an *addition* to and not a modification of the category which precedes them, and this tends strongly to support the view that "trader" includes any person actually engaged in trade. But even if this were not so, again the objection would apply to the unqualified emancipated minor as well as to the minor.

We must therefore look at the sub-section as a whole in order to determine the question. As already stated, it is in my opinion capable of the interpretation contended for by Petitioner, and this would seem to be in accordance with the intention of the Legislature which was, presumably, that any person who in fact, carries on a trade should be amenable to the provisions of, and entitled to the protection afforded by the Bankruptcy Laws.

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I therefore decline to dismiss the petition, and the hearing must proceed.

Attorney for Petitioner *Tranquille.*

Attorney for Respondent *Chaillet.*

Record No. 881.

HOSSEN ABDOOL *v.* THE KING

JACOOB HOSSEN KHAN *v.* THE KING

June, 5, 6
July, 2.

Complicity— by aiding and abetting — or giving instructions — Accomplice or Principal— Larceny—Art. 38 of the Penal Code—Conviction upheld.

Instructions given in view of a crime or misdemeanor to be committed and such as to render possible or even to facilitate the commission of the offence, are "instructions given for the commission of a crime" under the first paragraph of art. 38 of the Penal Code, and those instructions are punishable under the 1st paragraph whether given to an accomplice or to a principal ("co-auteur")

If a prisoner is proved to have been guilty of the act of complicity charged it is no bar to his conviction that he was also guilty as a co-author.

A prisoner charged with, and proved to be guilty of complicity under the first paragraph of art. 38 of the Penal Code is not to be acquitted because the evidence establishes that he was subsequently aiding and abetting the author of a crime under the third paragraph of art. 38.

APPEAL against a CONVICTION by the District Magistrate of the 2nd Division Port Louis, on charges of complicity in a larceny of 10 bags of rice.

The information in one count charged Hossen Abdool, (appellant No. 1) with complicity in the larceny of ten bags of rice by giving instructions to a subordinate, one Gapoonoosamy, who had the rice under his supervision, to allow the removal of the ten bags; and, in a second count Hossen Khan, (appellant No. 2), with knowingly receiving the stolen rice. The two accused were found guilty and sentenced, each, to four months' imprisonment with costs.

The grounds chiefly relied upon in appeal were, for both appellants, that the conviction was contrary to the evidence and specially: for the 1st appellant, that (i) the acts charged as acts of complicity did not constitute any offence under our law, (ii) if guilty as an accomplice, the appellant was so as an aider

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and abettor in the means of perpetrating or facilitating the offence and not (as charged) by giving instructions, (iii) the evidence did not exclude the possibility of his having acted in good faith throughout the transaction impeached; for the 2nd appellant: if guilty, appellant was guilty as a principal ("co-auteur") of larceny and not as an accomplice for receiving stolen goods.

June 5th—Nairac for 1st appellant Hossen Abdool. Evidence does not exclude possibility of honest mistake, 2nd appellant had a title justifying his taking possession of the goods and he may have persuaded 1st appellant that he was acting within his rights. At any rate 1st appellant is charged for giving instructions to one Gapoonossamy his subordinate to *allow the removal* of the bags. There is no reliable evidence that any instruction was given to anybody else and at all events *none other is charged.* Even if that removal is fraudulent, allowing the commission of a crime is no offence. Gapoonoosamy is not an accomplice and commits no offence. Each of the various modes of complicity enumerated in art. 38 constitutes different offences. Although appellant might have aided and abetted the author, (in this case the remover of the goods), by ordering the watchman not to interfere, he is improperly convicted for giving instructions under the first paragraph.

Sauzier K.C. The facts do not warrant Magistrate's conclusion, 2nd appellant at any rate is guilty as a principal. Removal of the bags from the Docks could not be effected without a permit, appellant went for the cart, obtained the permit of removal and is charged with altering the cart number on it. He was therefore a principal on the authority of *P.G.v. Sylvio (f), Ramsamy v. R. (g), Seringuay v. R. (h)*

Serret Ag.S.P.G.: Removal proved fraudulent throughout; though 1st appellant may have aided and abetted, he did also give instructions and is properly convicted. It is quite sufficient that instructions of any kind be given in view of the crime and so as to facilitate it. Gapoonoosamy would be an accomplice and instructions given to an accomplice fall within the 1st para. of

(f) 1901 D.S.C. p. 8 (g) 1902 D.S.C. p. 3.

(h) 1902 D.S.C. p. 109.

art. 38. The larceny was committed as the bags were just removed from the stack, in this act neither appellant participated directly and neither therefore is a co-author. 1907

The facts which the Appellate Court held to be proved were the following*—On the 5th March 1906, the two appellants were at the Cerné Dock where rice was being landed from two or three steamers. First appellant is a clerk of the India Boats Cy; the other, a clerk of Abdoola Joosub, consignee of part of the rice. Hajee Mamode Hajee Salay, another merchant, was on the same day receiving rice at the Dock through the same boating company. The bags of Abdoola Joosub bore his initials A. J., those of Hajee Mamode Hajee Salay the letters H.M.H.S. In the lighters conveying the rice to the Dock, the bags were huddled together, irrespective of consignees' marks. On their being landed, they were to be counted as usual, sorted and stacked under the shed, close to the landing stairs, in proximity to pillars bearing each a distinct number. At about 3 p.m. a cart bearing No. 416, in charge of carter Jean, was stopped while driving away, a few yards from the shed, by Tide-waiter Savrimootoo, who had received information that rice was being unlawfully removed. On the cart were ten bags of rice bearing the marks H.M.H.S. Jean explained that it was appellant No. 2 who had given him the rice to be conveyed to his (No. 2's) employer. Yacoob who was standing at a short distance came forth and said he had got the rice from Hossen Abdool (appellant No. 1). The Tide-waiter observed that he had no right to take away rice which was just being landed and of which no account had as yet been taken. Thereupon Hossen Khan begged for pardon. It was noticed then and there that the license number of the cart had been, in the delivery order, altered from 341 to 416, and that the rice to be taken delivery of under the order was rice bearing the initials A. J. A delivery order is a document with counterfoil, given by the Tide-waiter, in the usual course of business, to the consignee's clerk, to show that the Customs duties have been settled, and that the goods may pass the Dock's gates. The marks on the goods, their quantity or amount, the name of the owner of the cart and its

* This statement of the facts is taken from the judgment.

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license number, are inserted therein. The delivery order in this case was handed over by the Tide-waiter Mangeot at about 2.30 p.m. to Appellant No.2. Its counterfoil bears No.341 as the cart's license number. Mangeot in the Court below, swore that Hossen Khan asked him for a delivery order for ten bags of rice belonging to Abdoola Joosub, his employer, and gave him No. 341 as the license number of the cart to be used; No. 341 was inserted by Mangeot both in the order and in the counterfoil.The altering of the figure in the order was not made by him. Savrimootoo, the Tide-waiter, saw the two Appellants talking together near the office table of No. 1 about half an hour before he stopped the cart. Aza, a clerk of the India Boats Cy, gave evidence to about the same effect. He saw Hossen Abdool and Hossen Khan proceed towards pillar 11 where Gapoonoosamy, a watchman, was delivering goods and close to which a lighter bearing No. 230 was being unloaded. Gapoonoosamy delivered to Appellant No. 2 ten bags of rice marked H.M.H.S. The bags were put in a cart by carters. When the cart was stopped No. 2 said to No. 1, who had then gone back to his office desk, "Mr Savrimootoo has stopped the cart go and speak to him". No. 1 did not move, No. 2 went and spoke to Savrimootoo. As a watchman at a pillar, he would never allow bags to be removed previous to the noting down in his delivery book of the name and number on the cart and the marks on the bags. The ten bags were taken from a lot which had not even been counted. H. Jean, the carter, said it was No. 1 who pointed out to him the bags to be taken from a heap under the shed. No. 2 gave him the delivery order, telling him to take the rice to his (Appellant's employer's) shop. Jean knew the shop but not the employer's name. Gapoonoosamy, an old servant of the Company, who was on that day under the orders of No. 1 affirmed that at 3 p.m. at his pillar No. 11, he heard Hossen Abdool tell Hossen Khan: "Take ten bags of rice there". No. 1 then said to witness: "You need not mark this cart; I will mark the cart in my big book". Gapoonoosamy allowed the ten bags of rice, which were marked H.M.H.S. to be put by carters on a cart which Tide-waiter Savrimootoo stopped a little after. After the stopping of the cart Appellant No. 1

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told him to mark down in his delivery book the ten bags as if taken from a stack of thirty seven bags bearing initials A.H.N. Mr Kennelly, manager of the India Boats Cy. went to the spot a few minutes after the occurrence. Gapoonoosamy stated to him that he had acted by order of Appellant No. 1, the latter who was present kept silent. Carrim Hossen, one of the Dock's clerks, was ordered by Kennelly to make an enquiry then and there and to report. Gapoonoosamy at first denied having delivered the ten bags, but almost immediately after, he stated he had done so by order of Appellant No. 1. The latter denied, suggesting that possibly Hossen Khan had stolen the rice.

In January last, at the enquiry before the Magistrate, Mamode Saley stated that on the 4th of March Abdoola Joosub borrowed from him twenty bags of rice to be returned (sic) in 3 or 4 days and that he gave him a letter addressed to his clerk Soliman who was to deliver the rice from Mamode Saley's shop in Queen Street. Witness had sent in a claim to the India Boats Cy. for ten bags of rice from S.S. Sofala, short delivered.

Abdoola Joosub affirmed that he gave his clerk (Appellant No. 2) an order to go and get the twenty bags of rice. He heard of his clerk's arrest on the 5th March and he did not, he pretends, make any enquiry as to the cause of the arrest. In the Court below and on appeal, Hossen Abdool's defence was that the rice may have been delivered through error as a number of people were taking delivery at the time, of goods with various marks; that if he ordered the delivery of the bags H.M.H.S., (a fact he does not remember), he did so in good faith, the practice at the Dock being to deliver goods of one consignee to the agent of another, when the agent has authority, as Hossen Khan had in the present case, to receive these goods.

The judgment of the Court (SIR V. DELAFAYE C.J. and THIBAUD, J.) was delivered on *July 2*, by

THIBAUD, J.—[After stating the facts as above and discussing them the judgment proceeds :—] There is serious evidence, in our view against both Appellants and we are not inclined to reverse the unfavourable verdict on the question of fact.

With regard to the law of the case, we do not agree with the learned Counsel for Appellant No. 1 that the only instructions

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punishable under article 38 paragraph 1 of the Penal Code are instructions to one of the principals ("auteurs" or "co-auteurs") touching the act or one of the acts constitutive of the offence itself, and that, when given to another accomplice, the instructions are not punishable. The text of art. 38 par. 1 is very broad indeed. It incriminates all instructions given for the commission of a crime or misdemeanour, without differentiating between instructions to a principal and instructions to an accomplice. All that the paragraph seems to require is that the instructions be given in view of a crime or misdemeanour to be committed and be such as to render possible or even to facilitate the commission of the offence *(i)*. As to the ground of appeal that, if guilty, the two accused were guilty as principals and not as accomplices, we again cannot agree with the learned Counsel for the prisoners. This Court has already, in *Carrimbaccus v. Syndic of Pailles Canal (j)* and in other cases, endorsed the view of the Court of Cassation in the following cases: *Depoulx (k)* *Contour (l)* and *Fourguet (m)*, that in order that a party be convicted as co-author there must have been between him and the authors of a crime or misdemeanour simultaneous action and mutual assistance in the perpetration of at least one of the acts constitutive of the offence. We fail to see in this case any such simultaneousness or assistance.

Besides, il is settled jurisprudence in France, and it is common sense that a party may, at the outset, be simply an accomplice by one of the means enumerated in art. 38 Penal Code, and afterwards become co-author by taking an active and direct part in the commission of the offence *(n)*. It stands to reason that if that party is proved to have been guilty of the

(*i*) Garraud, Droit Penal, Vol.II p. 418. (Edn. 1886). Chauveau & Helie, Théorie du Code Penal, Vol 1 p. 465 (Edn. 1887). Cassation, case of Doineau, D. P. 1857. 1.455, seems to bear out the commentators.

Note.— The rubric in this case runs: "La réponse affirmative à une question de complicité par provocation. posée dans les termes du § 1 de l'art. 60 C C., est régulière et peut servir de base légale à la condamnation de l'accusé, bien qu'elle ne mentionne pas que la provocation a été exercée envers celui ou ceux par qui le crime a été commis, si elle constate d'ailleurs la perpétration du crime. Ed.

(*j*) D. S. C. 1900 p. 75.

(*k*) Dalloz Périodique, 1860-1-196

(*l*) " " 1861-1-358

(*m*) " " 1861-5-77.

(*n*) Dalloz, Jurisprudence Générale. Vo. Instruction Criminelle No. 3329, and the Supplément, Verbo, Complice, complicité No. 168.

act of complicity charged, it is no bar to a conviction that he was also guilty as co-author. We are equally clear that a party charged with and proved to be guilty of any act of complicity under art. 38 par. 1 of the Penal Code is not to be exonerated because the evidence establishes that he also subsequently aided and abetted the author of a crime or misdemeanor (art. 38 par. 3 Penal Code). We therefore see no reason to disturb the finding of the Magistrate either in fact or in law. The two appeals must be and the same are hereby dismissed with costs.

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Appeals dismissed.

Attorney for appellant Hossen Abdool *Robert.*
Attorney for appellant Jacoob Khan *Newton.*
Attorney for the Respondent *Rolando, C.A.*
Records Nos. 806 and 807.

Wow. COUVE *v.* D'UNIENVILLE

July, 17.

Evidence—Oral Evidence—Facts of Possession.

Circumstances under which Oral Evidence was admitted to prove that certain moveables, of more than sixty rupees value, the alleged property of A were left by her at B's place and were in B's possession.

CLAIM for restitution of certain moveables, valued at Rs 4000 alleged to belong to plaintiff, left by her at the place of the defendant and stated to be in the possession of the Defendant.

*Reference from Chambers on an objection raised in the pleadings to oral evidence of the following facts :—(*i*) that plaintiff had stayed at defendant's residence at Rose Hill, Phœnix and Beau Séjour, respectively from July 1902 to April 28th 1904; (*ii*) that when she quitted defendant's residence at Beau Séjour she took with her part only of her moveable effects; (*iii*) that the moveable effects and pieces of furniture mentioned in the account, copy of which had been duly served on the defendant, belonged to the Plaintiff and had always been in her possession until she left on the 23rd day of April 1904; (*iv*) that in the month of January 1904, the Plaintiff having resolved to quit defendant's residence at Phœnix to go and live at Curepipe, applied to the Station Master of Phœnix Railway Station to

*The statements of facts and arguments are taken from the judgment.

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hire a Railway carriage to convey her said moveable effects and pieces of furniture from Phœnix to Curepipe; (*v*) that besides the said moveable effects and pieces of furniture which were then at defendant's residence, Plaintiff's carriage and horse were in the stables of defendant; (*vi*) that the costs of removing Plaintiff's moveable effects and pieces of furniture from one residence to another was duly paid by her; (*vii*) that her country residence at Beau Bassin, known under the name of Summerfield, was occupied by Mr Eugène Duponsel and his family from December 1902 to the 1st of August 1905.

Sauzier K. C. (*Sir William Newton K. C.* with him) for Plaintiff: Defendant married Plaintiff's daughter in 1902 and a few months after the wedding, Plaintiff went and lived with the married couple. She took with her the moveable effects we claim. She lived with her son-in-law and daughter at several places from about the beginning of 1903 to April 1904, when difficulties having arisen between Plaintiff and Defendant on the one hand, and Defendant and his wife on the other, Plaintiff left the common roof removing part of the furniture she had brought to Defendant's house. After a divorce had been obtained against Defendant in July 1905, she applied to him for the articles she had left behind at his place, and had a notice, together with a list of the articles claimed, served on him, on the 1st September 1905, by an usher of this Court; Defendant denying any knowledge of furniture belonging to Plaintiff at his place, she, on the 1st September 1905, filed a statement of claim praying for an order for the restitution of the moveable effects, and in case of failure of Defendant to comply with the order, for the payment by him of Rs 4000, value of the said furniture. The Defendant, in his statement of defence, denied all the facts, matters and things in the statement of claim, and specifically, that he had in his possession moveable effects and furniture belonging to the Plaintiff. We contend that Plaintiff is entitled to prove by parol evidence the several facts in her notice of facts.

Art 1341 does not apply in this case. We do not claim under a contract between the parties. Our case is one of common residence (communauté d'habitation), and this we can prove by

witnesses. In such cases, the actual holder of moveable property cannot claim acquisition by instantaneous prescription as his possession is precarious. The Courts have frequently allowed oral proof of the ownership of the property in dispute in cases of common residence (*o*). If art. 1341 C.C. however, could find its application in a case like ours, we could claim the benefit of the exceptions thereto. Art. 1348 C.C. enacts that the rule in art. 1341 is to be departed from when it was impossible to obtain the written proof required. The impossibility referred to is a moral as well as physical impossibility (*p*). 1907

Newton, on the same side, quoted decisions of the Court of Cassation (*q*).

Esnouf, in reply: We do not invoke art. 2279 C.C. The Plaintiff claims under a sort of *contrat de dépôt*; she must establish her claim by writing or she must have at least a beginning of proof in writing. If she left moveables behind her, as she says, she should at the time have obtained from Defendant a written acknowledgment. There was no physical or moral impossibility of her doing so, considering the circumstances under which she left. It is only months after her departure that this claim is set up. Larombière (Vol. VI p. 540), Laurent (Vol. XIX No. 577; Dalloz, Obligation p. 1045.

The judgment of the Court (THIBAUD and DAVSON JJ.) was delivered on *July 17th* by

THIBAUD, J.— Our law, in civil matters, requires written proof or at least a beginning of proof in writing, of all things exceeding a sum or value of 150 francs when it has been possible to obtain that mode of proof (C.C. arts. 1341, 1347 and 1348 combined). By all things, must be understood all juridical facts whatsoever i.e. those having for their direct and necessary result the making, modifying, acknowledging, extinguishing etc., of a contract or agreement or of anything in the nature thereof. Demolombe on Contracts (Vol. VII No. 14 (a) p. 14), Larombière, Obligation (Vol. VI p. 406), Zachariae (Vol. VIII p. 299 (4th Ed.); Cass. Feb. 1812 S. 12-1-288), Demolombe (Loc cit No. 15); and with him, Courts and com-

(*o*) Dalloz, Sup. Vo. Prescription Civile, No. 130 p. 143, Cass. S. V. 1895-1-136.

(*p*) S.Codes annotés, art.1348,note 1.

(*q*) Cass. S.V. 1895-1-136; Cass. S.V. 1902-1-523.

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mentators explain why art. 1341 does not apply to bare facts ("faits matériels") as distinguished from juridical facts. Bare facts (" faits matériels "), according to French Authorities, are those simple facts which by their nature are productive only of material results and do not directly and necessarily give rise to a right or obligation, Demolombe (No. 15 b). They do not cease to be *faits matériels* though accidentally producing juridical effects Cass. (8th March 1898, S. 1902-1-523). Laurent is clearly of opinion that although facts constitutive of possession may accidentally give rise to rights and obligations, they have not always and of necessity such an effect. Possession, says he, is a fact, although it produces juridical consequences of great importance, and proof by witnesses is competent (Vol. 19 Nos. 423 & 424) ; vide also Duranton (Vol. 13 No. 360 etc., Bruxelles, 1816, Pasicrisie 1816, p. 26). Plaintiff in this case proceeds on the bare fact that certain chattels of hers, which, she says, she left in a certain place, are now in the unlawful possession of the defendant. There is not one word in her statement of claim or in her notice of facts about any contract, agreement or understanding having existed between defendant and herself touching those chattels.

We are of opinion that she is entitled to establish her contention by oral evidence. We do not think it necessary to say much of the collateral facts in Plaintiff's application in Chambers, for instance, that she resided with Defendant for a certain time ; that she formerly had possession of the moveables claimed, that she took them with her to Defendant's place etc. All these are pure facts and may evidently be proved by witnesses, and we cannot understand the objection touching them. Nor do we think it is useful to go into the question of common residence and the precariousness of a possession under it. If the possession of the moveables is brought home to defendant, it will be time to examine whether his possession is precarious or not.—Costs of the incident to be borne by the Defendant.

Attorney for Plaintiff *Newton.*

Attorney for Defendant *Edwards,*

Record No. 29518.

THOMAS *v.* FLORENT & ORS

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July, 8, 23.

Succession—Partition of—Appointment of Notary—Art. 828 of the Code Civil—Ord. 2 of 1890 arts. 13, 15 & 16—Notary.

On an application for the partition of a succession, it is competent for the Court to appoint a Notary to effect the partition and liquidation of the succession, although the property forming part of the succession has not yet been sold.

Bancilhon v. Bancilhon (*) considered.

A party is not barred from objecting to the appointment of any Notary at all, to liquidate a succession, merely because he has not raised that objection at a previous sitting when only the choice of the Notary was disputed.

Parties disagreeing, the Court appointed a Notary of their own choice.

Reference from Chambers, of an OBJECTION to the appointment of a NOTARY to liquidate a SUCCESSION.

Sir William Newton K. C. (*Delafaye* with him) for some of the parties supported the application for an appointment and suggested a Notary.

Sauzier K. C. for the Defendants resisted the application for an appointment and in the alternative suggested another Notary.

The circumstances of the case, appear sufficiently from the judgment of the Court (BROWN & THIBAUD JJ.) which was delivered on *July 23rd*, by

THIBAUD J.— This is a reference from Chambers on an objection to the appointment of a Notary to draw up a deed of partition of the goods and properties depending from the estate of the late Evariste Thomas. Before the Judge in Chambers all parties at first were agreed in principle to the appointment of a Notary, but disagreed as to the selection, some proposing Notary Vèle, who had made the inventory, others proposing Notary Gimel who had been the Notary of the deceased. At an adjourned sitting at Chambers, the present defendants raised the question that the application for a Notary to make the partition was premature, in as much as the immoveable properties had not yet been sold. On the reference it has been argued by Defendants that Plaintiff is barred by her original consent from now raising the question that the application is premature. We have

(*) S. C. R. 1880 p. 66.

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no difficulty in holding that the Notary not yet having been appointed Plaintiff is not barred from raising the objection.

In support of the objection that the application is premature, we have been referred to the decision of the Supreme Court in the case of *Baucilhon v. Baucilhon* (r) in which it was held that when all the real property depending from the succession has not yet been sold, an application for the appointment of a Notary was premature. The decision referred to was given prior to the passing of Ord. 2 of 1890; art. 828 of the Civil Code enacted that after the moveable and immoveable property had been appraised *and sold*, parties are to be referred to a Notary selected by the parties, or by the Court if they are not agreed, who proceeds to the operations connected with the partition. Ord. 2 of 1890 has introduced a different system, art. 12 (par. 3) says that in appointing a Notary a make the inventory the Judge may appoint such Notary at once to make the partition, which implies that it is not imperative that he should await the sale of either the moveable or the immoveable property before making such appointment, whilst from arts. 15 & 16, it results that the Master, before whom the immoveable property is sold, is expected to attribute the share of the sale price after collocating inscribed creditors, to the succession to be distributed by the Notary. It is only when no Notary has been appointed that the Master may proceed to divide the sale price among the heirs. It is clearly competent for the Judge or Court as the law now stands, to appoint a Notary to draw up the deed of partition without waiting until the property has been sold. The sole question is whether it is expedient to do so. As the sale of the moveable property has been ordered, and that of the immoveable property has been applied for and fixed, we see no reason for not making an appointment now, as was originally agreed, and was evidently the original intention of parties, and if the appointment was not actually made, it was merely because there was not complete agreement as to the selection of the Notary to make the partition. But after reading the affidavits and in presence of the conflict disclosed by them, we consider it better to appoint neither of the Notaries suggested; we accordingly appoint Mr

(r) S. C. R. 1880 p. 66.

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Notary de Spéville subject to his acceptance. Should he refuse the Judge in Chambers will appoint another Notary.

Costs to be costs of succession.

Attorney for Plaintiff *Tranquille.*

Attorneys for Defendants *Huteau* and *Ganachaud.*

Record No. 29938.

JEAN LOUIS *v.* JENKINS

Quasi-contract or Contract — Oral Evidence — Commencement of proof in writing—Personal answers—"Faits & Articles".

A claim for board and lodging supplied to a guardian's wards with his consent is not in the nature of a quasi-contract; it is based on contract and cannot be proved by oral evidence if the amount at issue is over Rs 60.

Circumstances in which, the Court reversing the finding of the Magistrate, held that personal answers of a Defendant constituted a beginning of proof in writing.

Action entered previous to amicable request, and consequences thereof.

APPEAL against a DECISION of the MAGISTRATE dismissing a claim of Rs 182.11 by Appellants, for board and maintenance of Respondent's wards. The proceedings before the Magistrate were as follows:

In the District Court of Port Louis — Jean Louis & Wife *v.* Jenkins—Plaintiff claims from Defendant the principal sum of Rs 182.11 being the amount of the expenses voluntarily reduced by the Plaintiff to the sum actually incurred by the said Plaintiff for the board, lodging and maintenance of the abovenamed minors, which expenses have been made with the consent of the successive guardians of the said minors and of the Defendant ever since the time the said minors have been left to the care of the plaintiff Mrs Jean Louis, composed as follows: 1o. The sum of Rs. 117.50 being the amount of the expenses voluntarily reduced at the said sum incurred for the purposes aforesaid for the month of September last up to the seventeenth of October last, for the minors Paul, Marc, Franck, Anna, Miliah, Roger and Louise Edith Fitzgibbon. 2o. The sum of Rs 26.31 being that incurred from the 18th last up to the 27th of October for the minors Paul, Marc, Frank and Roger Fitzgibbon. 3o. That of Rs 34.12 being the amount of expenses incurred for the minors Paul, Marc, Frank and Roger Fitzgibbon, for the same purposes from the 28th of October up to date, without prejudice to any further sum which may hereafter become due, in as much as the said Defendant has refused to pay the same with costs. [The proper figures should have been 182.10, 117.50, 28.60 and 36.00 respectively.]

Plea of the Defendant:— 1, General denial; 2, Not indebted; 3, The Defendant

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has offered and even tendered to Mrs Jean Louis, on several occasions, a cheque of Rs 54 for the expenses to be incurred during the month of October last for the minors Marc, Frank, Roger, Anna and Edith Fitzgibbon. Although the Defendant is not bound to pay any thing for the 19 days of the month of November last, during which Marc, Frank and Roger Fitzgibbon resided at Mrs Jean Louis, yet he has always been and is still ready to pay the sum of Rs 22.80 on that account, no demand was made for the payment of any sum, for those days, except by plaint. There fore the defendant prays that plaintiffs' action be dismissed with costs.

MR GELLÉ states that it is not denied by Defendant that Rs54 were tendered to and refused by Plaintiff for the month of October. It is denied that there was no demand made for November.

On motion of Mr Gellé, Defendant is called on his personal answers.

Samuel Jenkins :— I am the dative guardian of the minors Fitzgibbon. I was appointed guardian on the 27th of June last (1906), the minors were living with their sister, the Plaintiff, who was not married then. The children were liging with their sister since their mother's death. She looked after the children and provided them with the necessary supply. She get money from me. Every month Rs 54 were always given to her in a lump sum in advance for the expenses to be incurred during that month. I obtained the money from the rent received for the houses belonging to the succession. There was money invested at the Mutual Aid which produced monthly interest amounting to Rs 13 which was paid monthly to heirs Fitzgibbon. The money was to be shared among six children, plus a sister and a brother. None of the minors is still living at Mrs Jean Louis. The total amount of rent for September last was *Rs 73*. All the properties are free from mortgage. I paid for Insurance of three houses and keeping of same. And this has been the amount of rent collected on behalf of the minors, but the minors had expenses to incur for the Insurance and repairs of houses. All the net revenue of the minors was affected for the keeping of the minors and paid to the sister for that purpose. A certain sum was kept in case of emergency. I have paid Insurance for the houses. Premium was paid by me when due. I have made several payments to Mrs Jean Louis since I was appointed. I have receipts ; on the 5th of July, I paid Rs 54, on the 16th of July I paid Rs 19.98. I did not pay on the 27th of June last, when I was appointed guardian, a sum in advance for the expenses to be incurred for the month of July. I paid on the 5th of July Rs 54 for the expenses from the 27th of June to the 27th of July. The former guardian, I was told, paid before the 27th of June for the minors. There was an account of tutelle. I never made promise to pay anything for the keeping of the minors. When I took over the guardianship of the minors Fitzgibbon, they were in the custody of the Plaintiff and I allowed them to continue to reside with her. I paid on the 16th of July last, at the request of Plaintiff Rs 19. She told me she wanted that sum to provide the minors with clothing. The next payment in August amounts to Rs 54 ; it was for expenses from the 27th of July to the 27th of August. In September I paid Rs 54 for the expenses from the 27th of August the 27th of September.

The Magistrate ruled that there was no beginning of proof

in writing and non-suited plaintiff who elected for a dismissal. 1907

Appeal argued on *July 11th* by *Sir William Newton* (*Gellé* with him) for the Appellants and *Laurent* for the Respondent.

The grounds of Appeal and arguments appear sufficiently from the judgment of the Court (BROWN & THIBAUD, JJ.) delivered on *July 24th* by

THIBAUD, J.— This is a claim for Rs 182.11 for expenses incurred by Plaintiff for the board, lodging and maintenance of certain minors, which expenses were, it is averred, incurred with the consent of successive guardians of the minors. Defendant, the guardian of the minors, pleaded: [as above]. After hearing the present guardian on personal answers, the Magistrate gave effect to an objection to parole evidence, and non-suited Plaintiff, whereupon Plaintiff moved for judgment and appealed.

The grounds of appeal are 1o. in view of the nature of the claim, parole evidence was admissible. 2o. That, besides, the claim was in the nature of a quasi-contract, and Plaintiff should have been admitted to prove that board and lodging had been supplied. 3o. That the personal answers pointed to a sufficient commencement of written proof. 4o. That the Magistrate wrongly held that there had been no previous demand for the Rs 22.80. 5o. Because even though the tender had not been accepted, the Magistrate should have given judgment at least for the sum tendered instead of dismissing the claim with costs.

The case as stated in the Plaint is clearly in the nature of a contract under which the Defendant agreed that Plaintiff should supply the minors with board, lodging and maintenance, with the understanding that he should pay for the same, but without special stipulation as to the rate at which such board, lodging and maintenance should be paid for. Such being the case, the rules as to the admissibilty of parole evidence in matters of contract apply and not those as to quasi-contract. The sole question therefore for us to determine is whether there is a sufficient commencement of written proof to justify the admission of such proof. Jenkins (guardian on personal answers) admitted that with his consent the children were provided with board and lodging and necessaries by Plaintiff, with whom they resided and that such supplies were not to be made gratuitously,

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The expenses were however, he says, limited to Rs 54 monthly. He was appointed guardian on the 27th June 1906, and the minors were then living with Plaintiff. Apparently the sum was the limit fixed by him in proportion to the means of the minors; for the payments he made he says he holds receipts. He paid on the 5th July Rs 54, on the 16th July he paid Rs 19.98. He admitted that he did not pay on appointment Rs 55 for the expenses from the 27th June to the 27th July, but he was told that the former guardian had paid before the 27th June (date of his appointment) and he says there was a *compte de tutelle*; the sum of Rs 19 was supplied on the 16th July for clothing. In August he paid Rs 54, for expenses from 27th July to 27th August. In September he paid Rs 54 for expenses from 27th August to 27th September. It would appear from the above statement that Jenkins did not, as he originally stated, pay in advance at the beginning of each month.

We find in these personal answers a confirmation of two of Plaintiff's main contentions: 1o. that the expenses for the board, lodging and maintenance of the minors were incurred with Jenkins' consent; 2o. that they were not to be gratuitously incurred. The only question the parties are not at one upon is that of *quantum*. The plaintiff's theory is that the disbursements were made with the guardian's consent and that therefore every rupee spent must be repaid. Jenkins' view seems to be that by the acceptance of a cheque for Rs 54, monthly, there was at least a tacit understanding that the disbursements were not to exceed that amount. Plaintiff having obtained, in our opinion, from the personal answers what in law constitutes a beginning of proof in writing, rendering probable her claim, we consider that she is entitled to supplement that incipient proof by oral evidence.

There is another point we should notice in this appeal. Defendant in his plea confessed that Rs 54 were due for October and Rs 21 for the first thirteen days of November. We do not see why the Magistrate non-suited Plaintiff, instead of giving judgment in his favour in the sum of at least Rs 76, with or without costs, leaving her, if dissatisfied with the decision, to adopt any measure she migh

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consider fit and proper. The statement by Defendant that no demand for payment was made previous to the entering of the plaint could not, even if clearly made out, affect the position. An action at law is the most energetic form of a demand and if the plaint is well founded judgment must go for the Plaintiff. If there is proof however, that there has been no amicable request or extra-judicial application for settlement previous to the entering of the plaint judgment goes all the same for Plaintiff, but possibly without costs, or according to circumstances, with the costs, against the Plaintiff, of a useless and vexatious litigation. We reverse the decision of the Magistrate and remit the case back to him to be proceeded with in the light of our decision.

Costs of the Appeal against Respondent.

Appeal allowed.

Attorney for Appellants *de Chalain.*

Attorney for Respondent *Chaillet.*

Record No. 1177.

July, 24, 29.

(IN THE BANKRUPTCY COURT)

In re DE RAVEL

Bankruptcy— Trustee— Appointment of — Objection to same — Ord. 23 of 1887 art. 23 (2)

The Court declined, on the objection of certain creditors, to certify the appointment as Trustee of the Bankruptcy, of a person who had been for two years the Bankrupt's Accountant.

OBJECTION by certain creditors to the APPOINTMENT of a TRUSTEE, on account of his former connexion with the Bankrupt.

Sauzier K.C. and *Duclos* for objecting Creditors.

Rousset for appointed trustee and *Delafaye* for Bankrupt, supported the appointment.

Argument on *July 24th,* judgment on *July 29th* by

DAVSON, J.— This is an objection on behalf of certain creditors to the appointment of Mr Touche du Poujol as Trustee of the property of the Bankrupt. The objection is founded on

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article 23 (2) of the Bankruptcy Ordinance 1887 by which the Court is empowered to withhold its approval if satisfied that such appointment "has not been made in good faith by a "majority in value of the creditors voting, or that the person "appointed is not fit to act as Trustee, or that his connexion "with or relation to the Bankrupt or his Estate or any particular "creditor makes it difficult for him to act with impartiality in "the interest of the creditors generally."

Here the *bona fides* of the appointment is not questioned nor is there any aspersion on the integrity of the gentleman selected, but the objectors rely on the fact which is undisputed that he has been for about two years and a half employed by the Bankrupt as his Accountant. There have been several English cases decided under the section of the Bankruptcy Act from which our article 23 is taken but no one of them is quite in point. In the cases of *Martin (s)*, *Stovold (t)*, *Lamb (u)* and *Mardon (v)*; the Trustee was rejected, to put it shortly, on the ground that there might be a conflict between his own interests and those of the creditors of the Estate. Here it does not appear that Mr Touche du Poujol has any pecuniary interests which would be likely to clash with his duties as trustee; but this though a reason is not the only reason for which the Court would be justified in disallowing an appointment. It may, for instance, become the duty of a trustee to report to the Court, under Article 137 that the Bankrupt has been guilty of an offence under the Ordinance. I am far from assuming that is the case here, but it may be the case in this as in any other Bankruptcy, and I do not think it is going too far to say that if such a position arose, Mr Touche du Poujol's previous connexion with the Bankrupt would make it difficult for him to act impartially.

In the matter of *Games* ex parte *The Board of Trade (x)*, one of the grounds of objection to the Trustee was that he had been proposed by the brother of the Bankrupt: this was held not to be a good ground, but in the course of the argument, Cave J. is reported to have interposed with the remark. "You must show that the Trustee would be under the

(s) 5 Mor. 129; L.R. 21 Q.B.D. 29.
(t) 6 Mor: 7
(u) 1894 (2) Q. B. 805
(v) 1896 (1) Q. B. 140
(x) 1 Mor: 216

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" hand of the Debtor's brother. If you had shown that he was " his clerk or agent it might be a good reason to object to the " appointment, but as it is you must show some evidence of " partiality." This is only an " obiter dictum " but as far as it goes it tends strongly to support the view taken that the objection is a good one. I therefore decline to certify the appointment and I order the Accountant to act as Trustee.

The Trustee to pay the costs.

[The Accountant then intimated to the Court that it was his intention to apply for summary administration, but His Honour said that he could not entertain the application at that stage in as much as the appointment of the Accountant was not necessarily permanent, it being open to the creditors, under the Proviso to sub-sec. 4 of art. 23 to supersede the Accountant by appointing another person as Trustee.—Ed.]

Record No. 870.

C. MARDAY *v.* NOOR MAMODE CHATTOOR

July, 26, 1906
June, 7, 13
July, 4
Sept. 5, 6
Oct. 30, 1907

" Bankrupt "—" Debtor " —Search Warrant— Power of Judge to issue same— " Concealment " of goods—Ord. 23 of 1887—Bankruptcy form 46—Costs.

A Judge has no power under art. 62 (1) of Ordinance 23 of 1887 to issue a search warrant for the property of a debtor who has not yet been made bankrupt. " Bankrupt " does not include " debtor ", nor should the unfortunate wording of the form of warrant in the Schedule affect the reading of the clear language of the law itself.

Circumstances in which Rs 400 damages and Supreme Court Costs were allowed to a Plaintiff on whose premises a search was made for the goods of a "debtor" who was not a "bankrupt" at the time of the application for a warrant.

ACTION in DAMAGES for prejudice suffered by the execution of a search warrant on Plaintiff's premises.

Statement of claim (12th April 1906):—The Defendant, an alleged creditor of one K. Marday, on an application made by him upon evidence which Plaintiff alleges is false and malicious, did obtain from the Honorable Judge in Bankruptcy a warrant directing one of the Ushers of this Court to enter into the said Plaintiff's shop, situate at Vacoa, and there being to search for a certain quantity of alleged goods, namely ten bags oats marked $\frac{\text{J.C.\&Co}}{\text{F.F.O}}$, alleged to belong to the said K.Marday and to have been sold by him, the said Defendant, to the said K. Marday and to be concealed in Plaintiff's shop. The said search warrant was executed by

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Usher R. Audibert in the day time on the 6th instant in presence of the Plaintiff's customers and the public and no such goods were found. The Plaintiff avers that by law the Judge in Bankruptcy had not the right to issue a search warrant, there being no bankrupt before him, and that it was obtained upon false and malicious statements The Plaintiff has, by such false and malicious statements on the part of the Defendant and by the search made by an Usher in his shop under the aforesaid search-warrant on the said 6th April, suffered loss and prejudice to the amount of Rs 2000 which he, the said Defendant, is bound in law to make good.

Statement of Defence (April 18th 1906) :— The Defendant acting as the lawful creditor of K. Marday against whom an interim receiving-order under the Bankruptcy Ordinance had then been granted and which has since the 9th instant, been made final, applied to the Bankruptcy Judge for the warrant mentioned in the statement of claim and he took this step in the interest of all creditors of the said K. Marday. The Bankruptcy Judge had the power to issue such warrant, as a fact, there was, before the warrant was made, certain property belonging to the Bankrupt in the possession of Plaintiff to wit: 10 bags of oats concealed in Plaintiff's shop close to K. Marday's bakery at Vacoa and the Defendant had every reason to believe that the goods were still concealed in the Plaintiff's shop at the time he made his application for the warrant. That at all events, the Defendant had reasonable and probable cause for making the application and for making the statements that are contained in the affidavit he made in support of the application. That Usher Audibert before executing the said search-warrant applied to the said Plaintiff for leave to search for the said 10 bags of goods and it is the Plaintiff himself who took him round his shop and stores for the purpose. That the Defendant has caused no damage whatsoever to Plaintiff and therefore owes him nothing.

IN COURT *26th July 1906* :

Mathews was for Plaintiff.

Sir W. Newton K.C. (*Leclézio* with him) for Defendant.

The case was argued on *September 5,6,* and judgment of the Court (THIBAUD and DAVSON, JJ.) was delivered on *October 30,* by

DAVSON, J.—In this action Plaintiff, who keeps a retail shop at Vacoa, claims Rs 2,000 as damages for the loss and prejudice suffered by him in consequence of the execution of a search warrant on his premises at the instance of Defendant.

The warrant was issued by a Judge in Chambers under the provisions of the Bankruptcy Ordinance and the goods to be searched for were alleged to be the property of one K. Marday against whom an interim receiving-order had been made but who had not, when the warrant was granted, been adjudged bankrupt. Plaintiff contends that under the circumstances the Judge had no power to issue the warrant and avers, further,

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that it was obtained by false and malicious statements sworn to by Defendant. Defendant contends that the warrant was properly issued and says that he had reasonable and probable cause for making the statement on which he based his application.

The question as to the power of the Judge to issue warrant is purely a point of law and it will be convenient to deal with this first. The search warrant was issued under art. 62 (1) of the Bankruptcy Ordinance, 1887, which is as follows:

Art. 62 (1). Any person acting under warrant of the Court may seize any part of the property of a bankrupt in the custody or possession of the bankrupt, or of any other person, and with a view to such seizure may break open any house, building or room of the bankrupt where the bankrupt is supposed to be, or any building or receptacle of the bankrupt where any of his property is supposed to be; and where the Court is satisfied that there is reason to believe that books, papers or other property of the bankrupt is concealed in a house or place not belonging to him, the Court may, if it thinks fit, grant a search warrant to any constable or officer of the Court, who may execute it according to its tenor.

It will be seen that the property in respect of which powers of search are given is the property of a *Bankrupt* only, but it is contended for Defendant that in this article "bankrupt" includes a "debtor," i. e. a trader against whom a receiving order has been made but who has not been adjudged bankrupt.

We cannot accept this contention; over and over again in the Ordinance the distinction between "debtor" and "bankrupt" is recognised, so as to make it clear that by "bankrupt" is meant a debtor who has been adjudicated bankrupt [see for example, arts. 6, (c) and (d), 20 (12), and 35.] It is true that in some instances the word "debtor" would seem to include a "bankrupt" and in articles dealing with proceedings which, commencing before adjudication, may continue after it such a use of the word is convenient and intelligible, but we have searched the Ordinance in vain for an instance of the converse case, i.e. the use of "bankrupt" to include "debtor," and if we were to interpret this article in the sense contended for we should be enlarging its scope in a manner which, in our opinion, the legislature did not contemplate and which the language does not justify. The fact that K. Marday was subsequently adjudged bankrupt and that by art. 47 the Bankruptcy of a debtor is made to relate back to the time of a commission

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of the act of bankruptcy does not affect the question: *at the time the warrant was applied for* K. Marday had not been adjudged bankrupt and it was not certain that he ever would be so adjudged: his property was not the property of a "bankrupt" and had not yet become "divisible among his creditors". The form of search warrant prescribed by art. 62 (form 46) is most unfortunately worded, in as much as the word "debtor" is used instead of the word "bankrupt": this is eminently calculated to mislead unless reference be made to the article itself.The Schedule in which this form appears is "to have effect as part of the Ordinance" (art. 3) and if there were any ambiguity or doubt as to the meaning of "bankrupt" in art. 62 it might be permissible to consider whether the wording of the form threw any light on the matter, but here we are in no such difficulty and the form cannot in any wav modify what, in our opinion, is the clear meaning of the enactment to which it is subsidiary. We hold, therefore, that there was no power to issue the search warrant in question.

Coming now to the second point, the facts are shortly as follows: On the 6th April, 1906, an interim receiving-order was made in Chambers, against Plaintiff's son, K. Marday who carried on a bakery shop near Plaintiff's shop, and at the same time Defendant applied to the Judge for a warrant under art. 62 to search Plaintiff's shop. Defendant supported his application by an affidavit in which he swore that he had personally ascertained that the debtor, K. Marday, with intent to defraud his creditors, had removed 10 bags of oats from his bakery and that they were concealed in Plaintiff's shop. The warrant was granted and was executed on the same afternoon. No oats were found on Plaintiff's premises, and Mr de Comarmond, Accountant in Bankruptcy says that on that day he found the oats in K. Marday's store when he went there to take possession: this was 2 or 3 hours before the execution of the search warrant. According to Defendant, these oats had been sold by him in March to Plaintiff and K. Marday jointly, but the account for them was made out in K. Marday's name and accepted by him and he must be looked on as the person responsible for the debt. There is a conflict of evidence as to what happened to the

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oats up to the time when the Accountant found them in K. Marday's store. K. Marday and his "employé" Adolphe Brémon swear that the oats remained on the bakery premises from the time they were brought from town until the Accountant took possession of them and Plaintiff and his son Tambi, who works in his shop support this version. On the other hand Mr de Comarmond says that on the 6th, when he went to take possession he heard an Arab, presumably one of Defendant's agents say to Plaintiff "where are the oats that were in your shop" and that Plaintiff replied "They were sent back to the bakery store... my son put them in my shop for sale and as they were not saleable I returned them to him". Again Noor Mamode Chattoor, the Defendant, says that he was at Vacoa on the 5th April looking for K Marday when Plaintiff called him and took him into his (Plaintiff's) shop, showed him the oats and complained of their bad quality. Jaffer Nanjeer and Abdool Ally Mamode whom Defendant sent to Vacoa on the 6th to try and get payment for the oats both swear that Plaintiff shewed them the oats in his shop and complained of their quality.

We are satisfied that the oats were for a time in Plaintiff's shop, though they must have been sent back to the bakery before the Accountant arrived, but the important question is "were they *concealed* on Plaintiff's premises". We think that the evidence of Defendant himself and his witnesses conclusively answer this question in the negative. According to them not only was there no concealment but there was actually an invitation extended to Defendant and his agents to inspect the oats. It was contended at the bar that the mere withdrawal of the oats from the debtors' premises to those of Plaintiff amounted to a "concealment" within the meaning of art. 62, but we are unable to assent to this proposition and must attach to the word its ordinary and popular meaning.

We find, therefore, that the sworn statement as to concealment to which Defendant committed himself and without which he could not have obtained his warrant was not only made without reasonable and probable cause, but that it was in direct conflict with the facts as known to him. It is not, however,

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necessary in a case of this nature, to shew malice or want of reasonable and probable cause. The case is analogous to those where a Defendant has wrongly caused a provisional seizure of a Plaintiff's goods to be made and in such cases " bona fides " is not a sufficient defence. *Choolim v. Mahomed (t); Ah Min v. Haroon (u); Drieu v. Houet (v).* Defendant's object may, possibly have been to bring pressure to bear on Plaintiff in hopes that he would settle the oats' account but this is immaterial; he swore to facts which did not exist with the result that Plaintiff has suffered damage and in so doing he has been guilty of a " faute " and must make reparation.

As to the damage suffered the evidence was somewhat vague. Plaintiff says his losses were heavy and his son Tamby produced books which seemed to show a very considerable falling off as regards the sales in April and May, but the want of candour of these witnesses as to the fact of the oats having been at some time in Plaintiff's shop makes us disinclined to attach much weight to their evidence. It is clear, however, that the execution of a search warrant on Plaintiff's premises must have had a damaging effect on his business and we have unimpeachable evidence that the wholesale firms from which he got his supplies suspended his credit for some six weeks or more; this of course, would hamper him in his trade and prevent his keeping his store up to the usual level. On the whole, we think that an award of Rs 400 meets the justice of the case and we give judgment for this amount with costs. This amount might have been recovered in the District Court, but seeing that one point in issue was the power of the Judge to grant the search warrant we think the action was properly brought in this Court.

Attorney for the Plaintiff *Edwards.*

Attorney for the Defendant *Newton.*

Record No. 29656.

SAPERMAL *v.* R.

Oct. 28
Nov. 25

Embezzlement—Criminal Intent—Appeal against conviction—Practice—Attendance of Counsel—Postponement—Challenge of Magistrate.

(*t*) S.C. Rep. 1882 p. 120 (*u*) 1883 p. 62.
(*v*) 1891 p. 34

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Circumstances in which the Appellate Court reversing the Magistrate's decision, held that there was not sufficient evidence of fraudulent intention to justify a conviction for embezzlement

A Magistrate is not to challenge himself merely because he has on a complaint received in chambers, requested the Police to take the matter in hand.

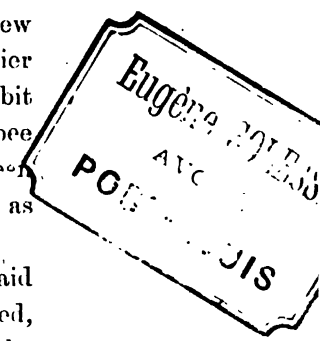
The counsel originally engaged by the accused party having withdrawn from the case, the Magistrate ought to have acceded to the request of another counsel, only just retained, and granted an adjournment of the trial.

APPEAL against a judgment of L. Clair Esqre, District Magistrate of Flacq sentencing Appellant to six weeks' imprisonment for embezzlement of certain monies and articles.

Case argued on *Oct. 28*, by *Leclezio* for the Appellant and *E. Serret, Actg. S. P. G.* for the Crown.

The grounds of appeal and the circumstances of the case appear sufficiently from the judgment of the Court (Sir V. DELAFAYE C.J. and DAVSON J.) which was delivered on *Nov. 25*, by

DAVSON, J.—This is an appeal against the decision of the District Magistrate of Flacq, convicting the Appellant of embezzling a certain vegetable seller's license (expired), and immigrant's ticket and the sum of R. 1.50, the property of one Mardaye. The articles in question were entrusted to Appellant by Mardaye for the purpose of his taking out for her a new license: the old license had to be returned to the District Cashier and it was, apparently, necessary for the applicant to exhibit the Immigrant's ticket on making the application. One rupee was the price of the license and fifty cents appear to have been given to Appellant as remuneration for painting a badge as soon as the license should be issued.



The reasons of appeal are as follows: 1o. Because the said judgment is bad in law and in fact; 2o. because the accused, now Appellant, was not called upon to, and did not plead to the amended information on which he was convicted; 3o. because there was no evidence to prove that the Immigrant's ticket had been delivered to Appellant; 4o. because there was no evidence to prove that the expired license had not been returned to the District Cashier; 5o. because there was no evidence to prove that the accused, now Appellant, had squandered or embezzled the articles mentioned in the information; 6o. because, before any proceedings were instituted, accused, now Appellant, had

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returned the R. 1.50, which he had kept only through a misunderstanding; 7o. because an expired license and an Immigrant's ticket are writings which operate neither obligation nor discharge; 8o. because the Magistrate at all events ought to have applied the First Offender's Ordinance. Of these reasons No. 2 has reference to the procedure followed, while the others (except No. 8 which was not pressed) relate to the substance of the charge, and with this latter set of reasons we shall deal first.

It is we think, clear that the money and articles mentioned were delivered to Appellant for the purposes stated and it is equally clear that he did not take out the license and that he returned the money to Complainant only after the lapse of two or three months and after she had been to the Magistrate to complain against him, but there was no evidence to show that he was aware of her visit to the Magistrate. As to the expired license, there is no evidence to show that the Appellant did not return it to the District Cashier and this allegation if true, could easily have been proved by calling that Officer. It is not necessary to go into an analysis of the evidence. The credit to be attached to the evidence was a matter for the Magistrate and with his finding on the facts we do not interfere. There was evidence which, if true, placed the conduct of Appellant in a very unfavorable light but we do not think the facts disclosed bring home clearly to him the fraudulent intention which is essential to the offence of embezzlement: the facts, discreditable though they are, are equally consistent with gross carelessness and negligence in carrying out what he had undertaken, coupled with a disregard for the truth in accounting for his delay. Taking the view we do, it is not necessary to determine the question raised in reason 7, whether such documents as the ticket and license can be subjects of embezzlement under art. 333 of the Penal Code; even assuming that they are, the case is not made out. So much for the substance of the charge; but there are some points connected with the procedure followed which we cannot pass over without comment.

The woman Mardaye went to the Magistrate on the 14th May to complain about Appellant, the Magistrate heard what

she had to say and then gave her a paper in the following terms to take to the Sub-Inspector: " Sub-Inspector Julien. — The " " woman Mardaye complains that she entrusted R. 1.50 to " " one Permal to take out her license, about two or three " " months ago, but he has done nothing yet. *As this man is well* " " *known* I shall be obliged if you look into the matter yourself." " (S.) Lucien Clair, — District Magistrate of Flacq.—14.5.07. " 1907 Dawson, J

With this action, we think there is no fault to be found except as regards the words we have underlined, which no not in our opinion, admit of the construction suggested by the learned Substitute Procureur General and which were at least, ill-advised as tending to lay the Magistrate open to imputation of a bias against the Appellant. On the 10th June the sub-Inspector laid an information on oath against Appellant in which the date of offence is given as " on or about 3 months ago " : here we pause to say that this is not the proper way of giving the date of an offence ; it is not essential that the precise day should be fixed, in some cases it is impossible,but here,"on or about three months ago" meant "on or about the 10th March" and the information should have been so worded. The case came on for trial on the 1st July Mr Jenkins for the accused asked the Magistrate to challenge himself on the ground that he had already heard complainant's version of her case privately and had then ordered the sub-Inspector to prosecute. The Magistrate declined to challenge himself and we think, rightly. As regards the interview with the Complainant a Magistrate is not in the same position as a Judge of the Supreme Court ; the people of the District come to him at times for advice and he naturally hears what they have to say, we cannot assume that in this case the Magistrate did more than was necessary to gather the *nature* of the woman's complaint and he then quite properly referred the matter to the sub-Inspector for enquiry without any orders to prosecute.

As regards the underlined passage to which we have already called attention it certainly seems to indicate that the Magistrate looked on Appellant with suspicion and it would have been better omitted, but whenever a Magistrate has been any length of time in a District there must be a certain number of persons

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who are known to him as more or less suspicious or dishonest characters and if he were to challenge himself whenever one of them appeared before him as a party, his usefulness would be greatly impaired and the whole business of the District Court would be dislocated. On the Magistrate's refusal to challenge himself Mr Jenkins withdrew from the case. Accused then moved for a postponement to allow him to retain Counsel and this was refused, Mr Leclezio then stated that he had just been retained and moved for a postponement in order that he might be instructed and this also was refused. These refusals we think were clearly wrong, the withdrawal of Mr Jenkins may have seemed to the Magistrate unwarranted, but the accused, charged with a serious and highly technical offence, was left without Counsel and was clearly at a disadvantage. Then when Mr Leclezio appeared it was manifestly impossible for him to do justice to his client without any instructions and time should have been afforded for this purpose. It is not to the point to say that the case was only part heard that day and then adjourned. When the postponement was asked for, it was not known that this would be the case and Appellant should have been afforded an opportunity of conferring with his Counsel before the case was substantially entered upon.

Mr Leclezio then took the very natural objection that the date of the offence as alleged in the information was too vague and thereupon the Prosecutor stated that "3 months ago" meant "three months before the 15 May". Could anything more clearly show the absurdity and inconvenience of wording a charge in such a way? The charge is dated 10th of June and the Magistrate is told that three months before this means "on or about the 15th February", this was practically altering the date of the alleged offence by about three weeks. Again a postponement was asked for because of this change of date and again the request was refused. The case then proceeded, but there is not a word in the record to show that the charge either in its original or its amended form was read to Appellant and pleaded to, by him. As however, the witnesses were cross-examined we must suppose that the Appellant was dealt with as having pleaded not guilty but whatever happened it is clear that his Counsel

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was at a disadvantage. It is true that there was an adjournment during which he might have received full instructions and it was of course open to him to apply to have any witness recalled for examination, but the whole procedure was most unsatisfactory and even if we took a different view as to the sufficiency of of the evidence we should hesitate to affirm a conviction obtained under such circumstances.

We trust that the fact of our holding that a postponement should have been granted in this case will not be misunderstood: unnecessary postponements should be discouraged in every possible way and the Magistrate who steadfastly sets his face against them is to be commended; they sometimes practically amount to a denial of justice and always tend to shake public confidence; but where a party, especially in a case where his liberty may be at stake is suddenly placed at a disadvantage as in this case, he must be given the opportunity of putting his defence fully and fairly before the Court.

We quash this Conviction.

Appeal allowed. Conviction quashed.

Attorney for Appellant *Marjolin.*

Attorney for Respondent *Rolando, C.A.*

Record No. 808.

CHUCKOO *v.* R.

Possession of stolen property—Larceny—Proof of Larceny—Conviction quashed.

Dec., 6

A Conviction by a District Magistrate, for possession of stolen property was quashed in appeal on the ground that there was no proof of the larceny.

APPEAL against a judgment of A. Hugues, Esq. District Magistrate of Port Louis, IInd Division sentencing Appellant to 3 months' imprisonment on a charge of being found on the 10th of August 1906 in unlawful possession of part of a tarpaulin stolen from the India Boats Company on or about the 8th August 1906.

The grounds of appeal were *i*, There was no evidence of the larceny of the tarpaulin. *ii*, The tarpaulin was not found in possession of the Appellant and the evidence in support of the theory that Appellant had at a date, which was never given with certainty, sold it to the person in whose possession it was

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found, was wholly unsatisfactory and ought to have been rejected. *iii* The conviction is not warranted by the evidence adduced.

Argument on *Dec. 6*, before THIBAUD and KŒNIG JJ. by

Nairac, for Appellant.— The only evidence which it was necessary to refer to in regard to the first ground was that of P.S. Lapierre who said that two persons had been prosecuted and convicted for larceny of one or several tarpaulins and that of Kennelly, Manager of the India Boats which was to the following effect: "on the 8th August 1906 or 1907, he inventoried his goods and found four tarpaulins missing. In October this year only two were found missing and those still missing were identical to the articles found in October 10th, in possession of different parties and then in Court":—that was no evidence of a larceny of the tarpaulin found in the possession of Appellant. The law and jurisprudence were in favour of his contention. He was stopped and

Newton Ag. A. S. P. G. for Respondent:— The evidence of larceny though slender is sufficient. There is presumptive evidence of the larceny and at any rate Appellant did not justify his possession of a property which was clearly shown to belong to the India Boats.

THIBAUD J.—The law is clear and the jurisprudence of this Court on art. 40 is settled.* When a conviction is sought for possession of stolen property there must be clear and conclusive evidence that the property found in possession of the accused was stolen. There is in this case no evidence to go to a jury that the tarpaulin concerned was stolen from the India Boats Company. I am of opinion that this conviction should be quashed.

KŒNIG J.—I concur entirely.

Conviction quashed—Appeal allowed.

Attorney for Appellant *Robert.*

Attorney for Respondent *Rolando C. A.*

Record No. 809.

*See in this connexion in D.S.C. Cases of *Teeroovengadon* 1872 p. 89 *Narrainen* 1876 p. 160, *Durand* 1878 p. 56, *Nandoosing* 1905 p. 2, and also, not reported *Lalikhan v. R.* No. 771, *Joseph Elvarie v. R.* Rec. No. 768 and *Lutchman v. Rex* Rec. No. 791. See also *Sadan v. R.* 1878 p. 75 [Ed.]

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